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A TREATISE

ON

THE LAW

OF

WILLS AND CODICILS.

A

TREATISE

ON THE

LAW

OF

WILLS AND CODICILS;

INCLUDING

THE CONSTRUCTION OF DEVISES,

AND THE

OFFICE AND DUTIES

OF EXECUTORS AND ADMINISTRATORS:

WITH

An Appendix of Precedents.

By WILLIAM ROBERTS,

OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

THIRD EDITION,

MUCH ENLARGED AND IMPROVED.

IN TWO VOLUMES.

VOL. I.

LONDON:

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TO THE

RIGHT HON. JOHN EARL OF ELDON,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

&c. &c. &c.

MY LORD,

IF this Third Edition of my Treatise upon Wills and Codicils shall have the good fortune to attract your Lordship's notice, I trust it will appear to be more deserving of your countenance than the first attempt which your Lordship was pleased to allow me to present to you. I beg to repeat that those parts of the Work which stand upon the firmest ground of principle and science were derived from your Lordship's decisions in the Court over which you preside; and that, unless I had drawn largely from that fund, I should have found it impossible to have reduced to any thing like consistency the vast assemblage of cases which centuries have accumulated upon the subject of these Volumes.

I beg your Lordship, therefore, to receive with your usual condescension and indulgence, this humble tribute of the respect which I feel for your Lordship's character, in common with all those who admire the pure administration of public justice, and the systematic illustration of the principles of English jurisprudence.

I am,

With unfeigned respect,

Your Lordship's obliged and obedient Servant,

WILLIAM ROBERTS.

ADVERTISEMENT.

In this Third Edition of the Treatise on Wills and Codicils so much has been omitted which appeared to the Author on his review of his original Work to have been superfluous, and so much has been added to supply deficiencies, that it may almost claim to be introduced to the public as a new performance. With such a boundless range of topics before him, to reduce his materials and distribute his subject have been the chief difficulties with which the Author has had to contend. Towards effecting these desirable objects, a mode of classification has been adopted which, if the Student shall be assisted by it in consulting, as much as the Writer has been in composing the Work, will deserve to be pronounced successful.

Law books of any magnitude, on their first appearance, usually come very short of what they were designed to be: but, in the present case, the Author would be greatly deficient in candour, as well as in discernment, if he did not admit, and lament the little that was effectually done, even by the Second Edition of his Work, towards repairing and correcting the defects of the First. A greater advance has, he hopes, been made by this third attempt, towards the attainment of his purpose,—that of laying

before the Student such a view of the principles by which the decisions in this intricate and almost infinite department of law have been governed, as may help him to discriminate and digest his own reading, and avoid the distractions of a science so perplexed with minute and multiplied distinctions.

During the progress of this Work some new Reports, and particularly those of Dr. Addams, of the cases decided in the Ecclesiastical Courts, have been in a course of publication, which, owing to the Author's various avocations, and his distance from the metropolis during much of the time in which he has been engaged in this Work, did not come to his knowledge till it was nearly all printed. He is glad to find, however, that the latest decisions of the Ecclesiastical Courts have not, in any essential degree, varied or affected the doctrines exhibited in these Volumes, as arising out of the cases under his view. The following points and particulars furnished by these recent determinations he thinks it proper to notice, with references to the places of this Work in which the same subjects occur.

The learning collected in Vol. II. p. 160. respecting republication by codicil is recognised in the case of Rogers and Browning *v.* Pittis, 1 Addams 30.

Concerning the ordinary presumption of abandonment by the act of cancellation, and the description of evidence necessary to rebut such presumption, which are subjects treated of in Part IV., Chapter iv., Section 6., of this Work, the Reader will find much valuable illustration in the case of Lord John Thynne *v.* Stanhope, 1 Add. 52. In page 32, the Author has observed that cancelling is a circumstance presumptively indicating intention to revoke: but perhaps he has not left it sufficiently clear that the

law infers revocation from the simple act of cancelling, unless it can be clearly shewn that the cancelled instrument once existed in a finished state; and also that the testator adhered to it perseveringly, in mind and intention, notwithstanding the cancellation. And see Davis *v.* Davis, 2 Add. 223.

To the cases produced from Doctors' Commons in the Fifth Chapter of Part I., to shew the principle on which the Courts have proceeded in receiving or rejecting informal testamentary papers, may be added that of Roose *v.* Moulsdale, 1 Add. 129.; from which it appears that a testamentary paper, not finished in itself, nor finished in the deceased's apprehension of it, will have no effect given to it, where the deceased had time and opportunity to have completed it, if he had thought proper. Beatty *v.* Beatty, 1 Add. 154., further shews that the presumption of law, though slight, is against a testamentary paper, with an attestation clause, not subscribed by witnesses, and must be rebutted by circumstances before the paper can be pronounced for: and see the instances of what may rebut such presumption in the case of Warburton *v.* Burrows and Another, 1 Add. 383. and Doker *v.* Goff, 2 Add. 42. See also the instructive case of Montefiore *v.* Montefiore, 2 Add. 358., wherein the following observations of the Judge are very important: "Where a paper is unfinished, as well as unexecuted, (especially where it is just begun, and contains only a few clauses or bequests,) not only must its being unfinished and unexecuted be accounted for, but it must also be proved (for the Court will not presume it,) to express the testator's intentions, in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case,

that the deceased had come to a final resolution in respect to it, *as far as it goes*: so that by establishing it, even in such its imperfect state, the Court will give effect to, and not thwart or defeat the testator's real wishes and intentions in respect to the property which it purports to bequeath, in order to entitle such a paper to probate, in any case."

To what occurs in page 174, Vol. II. respecting the common and solemn forms of proving wills, may be added the point determined in Bell *v.* Armstrong, 1 Add. 365., that a next of kin, after he has acquiesced in the probate taken in the common form, is not precluded from calling in such probate, and putting the executor to proof *per testes*, even though he may have received a legacy under the will so proved: but the legacy so received must first be brought in.

It may be of importance to add to what is said towards the conclusion of Chap. V., Part I., on Nuncupative Wills, the observation of the learned Judge in Lemann *v.* Bonsall, 1 Add. 389., that, independently of the statute of Frauds, the *factum* of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every particular.

It is observed in page 186, Vol. II., that the Ordinary is to grant administration of the husband's effects to his widow, or next of kin; to which may be added the authoritative position in the case of Webb *v.* Needham, 1 Add. 494., that the widow is usually preferred to a next of kin, notwithstanding her having married again.

The case of Gibbins and Gibbins *v.* Cross, 2 Add. 455. furnishes illustration to the points occurring in Part IV. Chap. iv., Sect. 2. of this Treatise, on the Doctrine of Presumptive Revocation by Marriage, and the Birth of a

Child: and in the same case we find it authoritatively laid down respecting wills of personal estate, that the said presumption, (the strength of which may vary according to circumstances,) may be rebutted by evidence shewing that the testator meant his will to be effectual notwithstanding his marriage, and the birth of issue: but that such evidence must satisfy the Court of this unequivocally; and that a formal codicil made after the marriage, referring in direct terms to the will made before, would, as a republication of the will, produce that effect.

The doctrine of the Ecclesiastical Courts as to the question, whether upon the cancellation of a revocatory will, the revoked will is restored to its operation, on which some observations occur in page 35, of the Second Volume of this Treatise, has received some illustration from the case of Usticke *v.* Bowden, 2 Add. 116.

The rule of construction stated and exemplified in Vol. I., page 476, and several succeeding pages, whereby a *particular* and secondary intention expressed is made to give place to the general and leading object of the testator, inferrible from the context of the will, has been confirmed, and extensively applied in the recent cases of Murthwaite and Others *v.* Jenkinson and Others, 2 Barn. and Cresw. 337. And in Mellish *v.* Mellish, *ib.* 520., an expansion was given to a word of individual import, (as the word "son,") by construing it as descriptive of a class of persons, (as "male descendants,") in order to give effect to the plain general intention of the testator.

We will in this place only add, by way of excusing the omission of references to many cases in the books, old and new, that the design of this Work is not to bring before the Reader an accumulation of judicial decisions, but a large and lucid exposition of principles; and that

where a doctrine has been repeatedly determined by successive adjudications, without any enlargement or modification, it has not seemed to the Author to be useful or expedient to multiply authorities.

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A

TREATISE

ON

WILLS AND CODICILS.

PART I.

THE CONSTITUTION OF WILLS.

CHAP. I.

The Progress of the Law.

ALIENATIONS, to take effect after death, can only be the practice of an advanced period in the progress of society: after the hand that held and maintained the possession is withdrawn, to permit the will of the proprietor to direct the succession, implies a conception of the sacredness of property, and a state of order and security, which does not exist in the beginnings of nations. *Omnino rationi naturali repugnat, alicui jus esse statuendi de rebus suis ita, ut voluntas post mortem valere incipiat; ubi jam velle desiit et mors omnia solvit.* (a) Among the ancient Germans the children succeeded to the possessions of the parent, who had no power to alienate them by his will. If he had no

(a) *Hert. Elem. Polit. pars* 2. *sect.* 11. § 53. *Vid. Vinn. Comm. tit. De Test. Ordin.*

children, the steps in the order of inheritance and succession were the *patres, patrui, avunculi.*

Progress of the *testamenti factio*, in the Roman jurisprudence.

The succession of the heirs of the body, and in case of the defect of such representatives, of the next in proximity of blood, if not a law of nature, seems so to correspond with its dictates, that history hardly carries us back to a time when the notion and admission of this claim did not prevail among mankind: the suggestions of a common feeling appear to have made it a universal rule of transmission, and to have established it in communities widely separated by time and place. But though the representation in the channel of blood and proximity may be higher in its origin than any positive institutions, to positive institutions we must of course refer for the *modifications* of the principle; which, indeed, has been so variously ordered, that no two nations exactly resemble each other in their institutions regarding it.

That the right of controlling this succession by the private will of the possessor, was the product of an improved period of legislation, there is much concurrent testimony to shew. Till the legislation of Solon the Athenians did not possess this privilege, as appears from many authorities, particularly from Plutarch, in his life of Solon, (p. 196, edit. Bryan,) and the orations of Isæus, especially *De Philoctemonis Hereditate.* According to Selden *De Success. Bon. Hebr.* c. 24. it did not exist among the ancient Jews; nor as we learn from Tacitus *De Mor. Germ.* c. 20, among the Germans in his day. The tenderness which continued to prevail among the Romans for the legal heir is strongly displayed in their provisions by the laws *Furia, Voconia,* and *Falcidia;* and more pointedly perhaps by their remedy of *querela inofficiosi testamenti,* wherever a will was made against the order of natural affection, without reasonable cause.

With respect to the question how far the right of disposition by will existed among the Romans, before the laws of the Twelve Tables, there seems to be much

variety of opinion. The text of Justinian propounds the order in which the form of the *testamenti factio* proceeded, which the student will consult with pleasure in the Commentary of Vinnius, edited, with notes, by Heineccius, in the title *De Testamentis Ordinandis:* where it appears that the most ancient mode of making a testament among the Romans was, by converting a man's private will into a public law, which seems to have been the object and intention of the promulgation or celebration of a testament in the *calatis comitiis,* i. e. in the presence of the Roman people summoned before the Sacerdotal College *per curias.* And, according to Heineccius, these assemblies were not convened specially for the purpose of giving sanction to wills, *sed legum ferendarum magistratuumque creandorum causa immo et ob alia negotia publica, bellum, pacem, judicia.*

Thus was this private disposition by testament of the property of an individual promulged and ratified in the same manner as a public law; and for this reason the *testamenti factio* has, in the text of the imperial law, been said to be *non privati sed publici juris, D.* 28. *c.* 3. and again by Ulpian, it is said, *legatum est, quod legis modo—testamento relinquitur, Ulp. tit.* 24. § 1.

Another sort of testament which existed antecedently to the laws of the Twelve Tables, was that which was called *testamentum procinctum* or *in procinctu,* the making of which was the privilege only of those who were on the eve of going to war, or *girt* for the battle, with the uncertainty on their minds of their ever returning, and was among the immunities in regard to property conferred by the Romans upon the defenders of their country.

But as the *comitia* were held but twice a year, so that a man might be surprised by sickness without having the opportunity of thus solemnizing his last will, and the attendance upon these public assemblies was often

difficult or impossible to the aged and infirm; and furthermore, as women were by these forms precluded from making any testament, as not having any communion with these *comitia*, according to Gellius, lib. 5. c. 19, a third method was struck out which might facilitate the ultimate disposal of private property to all descriptions of persons, otherwise competent; and this last method was called the *testamentum per æs et libram*, which was a fictitious purchase of the family inheritance of heirship, by money weighed in a balance, and tendered by the intended inheritor to the testator, before witnesses.

Thus it is said to be *imago vetusti moris in venditione atque alienatione rerum mancipi, quæ uno verbo, mancipatio dicitur, nimirum ut is in quem hæ res transferebantur, eas emeret domino ære et libra, appenso ei νομου χαριν nummo uno.* And it seems that this fictitious proceeding was still retained after the promulgation of the law of the Twelve Tables had authorized the making of wills by the clause of *paterfam. uti legassit, &c. ita jus esto;* it being still regarded as necessary, in order to raise the will of a private man to a level with the laws of the state, that it should take the shape of a strict legal transaction *inter vivos;* for *testandi de pecunia sua legibus certis facultas est permissa, non autem juris dictionis mutare formam, vel juri publico derogare cuiquam permissum est.* C. 6. 23. 13. The two former methods, by the *testamentum in procinctu*, and *calatis comitiis*, were thrown into total disuse, by the *testamentum per æs et libram:* but this last form of willing again made way for others of a more convenient description.

The methods above-mentioned were referrible to the *jus civile*, or, as we express it, the law of the land: but from the edict of the prætor other forms at length were brought into practice: the *mancipatio* and the weighing and delivering of money were dispensed with, and in their stead, the solemnity of *signing* by

seven witnesses was introduced: the *presence* only, and not the *signature* of witnesses, being necessary by the *jus civile*.

At length, however, by gradual use and progressive alterations, as the text of Justinian informs us, the *lex prætoria* and the *jus civile* were in some degree incorporated, and a compounded regulation took place, whereby it became requisite to the valid constitution of a will that the witnesses should be present (the presence of witnesses being the rule of the *jus civile*); that they and also the testator should sign, according to the superadded institution of positive law; and that in virtue of the prætorian edict, their seals should be affixed, and their number should be seven.

Afterwards, the further solemnity of naming the heir in the testament was added by Justinian, and again taken away by the same emperor, in Nov. 119. c. 9. and at length, the excess of testimony was corrected by the canon law in the pontificate of Alexander the Third, by which it was declared sufficient to prove a testament by two or three witnesses, the parochial minister being added; *improbata constitutione juris civilis de septem testibus adhibendis ut nimis longe recedente ab eo quod scriptum est—in ore duorum vel trium testium stet omne verbum, Swinb.* 64. *Deut.* c. 18. *Matt.* c. 18., which reformation obtained the sanction of general usage.

Swinburn says that this institution has also been reformed by the general custom of this realm, "which distinctly requires no more than two witnesses, so they be free from any just cause of exception;" which observation he repeats in several places of his Treatise on Wills, on the authority of Linwood, in *Statut. Verb. Prob. de Test. l. 3. Provincial Constit. Cant.* Bracton also has the following passage:—"*Fieri autem debet testamentum liberi hominis ad minus coram duobus vel pluribus viris legalibus et honestis, clericis vel laicis, ad hoc specialiter convocatis, ad probandum testamentum defuncti si opus fuerit, si de testamento dubitatur.*"

Bract. lib. 32. fol. 61.: which words import a recommendation, and not an imperative rule; and nothing seems now to be better understood, than that a will of personalty needs neither the attestation of witnesses, nor the testator's seal or signature; and though written in another hand, yet if proved to have been written according to the testator's instructions, and approved by him, it is a good will to dispose of chattels.

If the power of disposing of land by will was exercised by our Anglo-Saxon ancestors, as from recorded instances there appears little room to doubt, (*a*) it seems much less likely that it originated with themselves than that they adopted it from those laws which the Roman government had established and left standing in this country. It appears, however, pretty certain, that this testamentary power over land did not survive the Norman conquest, except in some cities and boroughs, where, by particular favour, the Saxon institutions were suffered to breathe: (1) it ceased by the operation of the feudal system of property, which necessarily excluded all voluntary alienations of possessions with which personal services and duties were inseparably connected. But with respect to moveables, the testamentary power seems, in this country, with more or less restraint, to have been exerciseable in a very remote period. The ready mode of authenticating the property in goods by the possession, and of transferring the possession by manual delivery, and the usufructuary and revocable quality of terms of years, caused them at an early period to be considered as proper subjects for every kind of alienation.

But though testaments of moveables were permitted by the ancient law of England according to Glanville

(*a*) Spelm. Treat. Feuds, 22. Wright's Tenures, 172. Lamb. Peramb. 492. Madd. Form. Ang. 421.

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(1) Whether gavelkind lands in Kent were devisable by the custom seems to have been a matter in dispute. See the arguments *pro et con* in Rob. Gavel. 235.

and Bracton, yet the power extended only to one-third, called the dead man's part; which limitation seemed to prevail in London and York, after it had fallen into disuse in other parts of the kingdom, till at length by several statutes the testamentary power over goods was thrown generally open. (2)

According to the author of the Commentaries, "by the ancient common law of the land, and which continued at the time of Magna Charta, a man's goods were to be divided into three parts, of which one went to his heirs, or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might dispose of one moiety, and the other went to his children. If he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without wife, or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts, and the writ *de rationabili parte bonorum* was given to recover them.

In the reign of Edward the Third, this right of the wife and children was still held to be the common law, though frequently pleaded as the local custom of Berks, Devon, and other counties; and Sir Henry Finch lays it down expressly to be the general law of the land, in

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(2) By the 4th W. and M. c. 2. persons within the province of York may dispose by will of all their personal estate, in as large and ample a manner as within the province of Canterbury, and elsewhere; and the widows and children, and other kindred of such testator, are barred of their claims under the custom. But the citizens of the cities of York and Chester, who were freemen, inhabiting there, being excepted out of this statute, the 2d and 3d Anne, c. 5, was made to repeal this exception, and to put them upon the same footing, in this respect, as persons within the province of York. And by the 11th Geo. 1. c. 18, the citizens and freemen of the city of London are also enabled to devise and dispose of their personal estate in such manner as they shall think fit, except where they enter into any agreement on marriage, or otherwise, that their personal property shall be subject to or distributed by the custom. In cases of intestacy the property becomes subject to, and distributable according to the custom.

Restraints upon the testamentary power by the customs of York and London, removed by statutes.

the reign of Charles the First. But the law has since been altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels, though it would be difficult to trace out when this alteration (c) began. (3)

(c) 2 Bla. Com. 491, 492.

Of the power of bequeathing legacies in the different stages of the Roman law.

(3) The difference in importance always recognized in our law, between land and goods arose out of the principles of the feudal system. According to the law of Rome, no such difference subsisted. The general representative was the heir, and by that title he succeeded as well to the moveables as immoveables. And when the *whole* substance devolved, the difference was only between him who was appointed heir by the will, and was called the *hæres institutus*, and him who succeeded to the intestate as his natural heir. Of the goods only he was called *hæres testamentarius*, and it was observed by Lord Hardwicke (3 Atk. 300.) that *executor* was a barbarous term, unknown to the civil law.

The following is a slight summary of the practice and forms of bestowing particular parts of a man's possessions by way of legacy, under the different stages of the Roman law, which had its origin in the clause of the Twelve Tables, "*uti quisque legassit*," &c. whereby the general testamentary power as to the *legata* as well as the *hæredum institutiones*, was confirmed.

The *legata et fidei-commissa* were the two modes whereby the testamentary disposition of property in *particular* things was effected; in contradistinction to a gift of the universal inheritance or substance of the testator; in the disposal whereof, and in the institution or appointment of the universal heir, consisted properly the *testamenti factio*.

Another very important distinction between the *hæreditas ex testamento* and the *legatum* was this—that the latter was purely lucrative, whereas the former was often burthened with obligations, and sometimes to such an extent as to be thereby rendered unprofitable. By the text of the imperial law, the legacy, or *legatum*, was defined to be "*donatio quædam a defuncto relicta, ab hærede præstanda*," and great stress was laid by the commentators on the word '*quædam*,' as importing something having the quality of a gift in *some* respects, and yet essentially differing from it in *others*. A gift they said it could not be, because a gift was properly a transaction between two persons, and requiring for its perfection the acceptance of the donee.

A legacy did not depend upon the acceptance of the legatee, nor was it a transaction between two persons; it was the creature of the testator's will only, ambulatory and suspended during his life. In a

With respect to land the feudal system was long in giving way to the increasing propensity of individuals to make provisions that were to take place after death.

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strict sense, indeed, it was considered as expecting the acceptance or assumption of the inheritance by the heir, with the function belonging to it; *post mortem testatoris adhuc pendet ab additione hæreditatis.* And yet it was *quædam donatio*, as proceeding from the benevolence of the testator, and conferring a title of emolument only —*titulus, merè lucrativus.* The latter words of the definition '*ab hærede præstanda*,' are to be understood as implying, that, although the *property* in the thing bequeathed passed directly to the legatee, the *possession* was nevertheless to be looked for at the hands of the heir.

We learn from Justinian's Institutes, *tit. De Legatis*, what were the ancient methods and forms of bequeathing, which, by their strictness and technicality embarrassed, and sometimes disappointed the wishes of, the testator. These various forms gave a diversity of rights and remedies to the legatary, and were of unequal efficacy in respect of the disposing power of the testator: as, for example, by one form a testator could dispose only of what was already his own property: by another, he could dispose of the possessions of other men, provided they were saleable, as far as his assets in the hands of the heir would suffice for the purchase; some gave a right of action *in rem*, and some *in personam*. These and other particulars respecting them, the Reader will find well explained in the Commentary of Vinnius, *tit. De Legatis.* The enquiry is, however, only a matter of curiosity, as Justinian, by a sensible law, reduced these various forms to one and the same operation.

But as the general strictness belonging to them all still remained, though the intricacy of distinction between them was removed, the same Emperor, by a stroke of liberal policy, levelled the distinction in point of *effect*, between the *legata* and the *fidei-commissa*, and thereby the rigid forms of expression, the necessity of the previous appointment of an heir, the testator's inability to extend the benefit beyond the life of the heir, or to bequeath it by an instrument less solemn than a regular testament, or codicil confirmed by a testament, were all removed, and the same indulgence given to the bequest by way of *direct legacy*, as to that which was effected through the medium of a *trust*.

In virtue of this ordinance, and in the prosecution of its spirit, a more liberal interpretation obtained in the construction of testaments, in which from thenceforward the intention of the testator was the principal object of enquiry, and a numerous description of persons whom the rigour of the *jus civilis* had pronounced incapable of taking

It seems, however, that with the consent of the superior, the feudatory often contrived to alienate by a donation by deed, made on the bed of death, *mortis causâ;* which, being a gift to take effect, in point of form, *de presenti,* though its real effect was postponed to the death of the grantor, might introduce this ambiguous kind of *testamenti factio,* with less novelty of principle. (*d*) It seems, indeed, that the consent of the heir was, at first, and for a long continuance, thought necessary to these alienations by deed, in prospect of death; though, according to some writers, this practice was worn out before the statutes of Henry the (*e*) Eighth. (4) Soon after the statute of *Quia Emptores,*

(*d*) Glanv. lib. 7. c. 1.

(*e*) See Dal. on Feuds, c. 3. sect. 1, and Spelman's Remains; also Glanv. l. 7. c. 1.

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by way of legacy, such as the banished, the childless, persons living in celibacy, and strangers, had their incapacity removed, and thus the circuity and precariousness of a trust were avoided: at the same time, to equalize the advantages respectively belonging to the *legata* and the *fidei-commissa,* instead of the extraordinary and sometimes dilatory process by which the *fidei-commissa* were enforced, the ordinary remedy by the *actio ex testamento,* and even the *rei vindicatio,* in the cases where it applied, were allowed to all descriptions of legataries.

Of the *donatio causa mortis.*

(4) The *donatio causâ mortis* is a title of the civil law, and of our own, to which the attention of the diligent student should be directed. In the text of the Institutes of Justinian, lib. 7. it is thus defined, or rather described; *Mortis causâ donatio est, quæ propter mortis fit suspicionem quum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accipit: sin autem super vixisset is qui donavit, reciperet; vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit. Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia. Nam cum precedentibus ambiguum fuerat, utrum donationis, an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia, et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legatis connumeretur, et sic procedat, quem ad modum nostra constitutio eam formavit. Et in summâ mortis causâ donatio est, quum magis se quis velit habere, quam eum, cui donat, magisque eum, cui donat, quam hæredem suum:* which description the Emperor illustrates by an example from the Odyssey, of the gift of Telemachus to Piræus

had concurred with other causes to render the testamentary power over land as well as moveables an object of universal desire, the difficulty arising from the

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(See also other examples of the antiquity of this species of gift in Taylor's Elements of the Civil Law, p. 536, 7.)

According to Vinnius, in his Commentaries on the *donatio causâ mortis*, it is not necessary to the constitution thereof, that the giver should be in actual and imminent danger of death: but it is enough if he be moved by the general consideration of mortality, *sola cogitatione mortalitatis ex sorte humana*, provided he expressly declares at the time, that he gives with such expectation and intention; otherwise the gift will be construed a pure and simple *donatio inter vivos*, and, consequently, will not be revocable. The same account of it is given by Swinburn in the seventh section of his Treatise on Testaments and Wills. But in our courts of equity, the description of this species of donation has been confined within narrower bounds, being limited to those cases where a man lying in extremity, or being surprised with sickness, and having no opportunity to make his will, lest he should die before he can make it, gives, with his own hands his goods to his friends about him. "This," says Lord Cowper, "if he dies, shall operate as a legacy: but if he recovers, then the property thereof reverts to him." See Gilb. Eq. Rep. 12, 13. Prec. in Chan. 269. 1 P. Wms. 405, 442. 3 P. Wms. 358. 1 *Ves. Jun.* 547. The reader, however, will find in Still *v.* Chapman, 2 Bro. C. R. 612. a decision of Lord Thurlow on this subject, conformable to the explanation given in Vinnius and Swinburn, as above mentioned.

It appears quite clear, according to all the authorities, that there must be a delivery of the thing by the giver in his life-time; and it is observable that Lord Cowper's expression in the case of Hedges *v.* Hedges, Prec. in Chan. 269, was,—"gives with his own hands." By Lord Hardwicke, in the case of Shargold *v.* Shargold, 2 Ves. 431, it was said, that the delivery must be *actual*, and that a *symbolical* delivery would not do; for which reason his Lordship held, that a delivery of receipts for S. S. Ann. made in the donor's last illness, and expressly in contemplation of death, was not a good *donatio mortis causâ*; consequently, said his Lordship, this was merely legatary, and amounted to a nuncupative will, and was contrary to the statute of Frauds; for if the necessity for delivery were taken from the thing, it remained merely nuncupative.

Upon the same ground, his Lordship held that it was impossible to make a donation *mortis causâ* of stock or annuities, because in their nature they were not capable of *actual* delivery; Ward *v.* Turner, 2 Ves. 9, 431. Swinb. 58. n. and that therefore there could not be a gift

necessity of livery of seisin was eluded by the practice of making feoffments to uses, over which, (by the assistance of the courts of equity, wherein declarations and

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causâ mortis of them, without a *transfer*, or something amounting to a transfer. And upon the same principle it was judged, in Miller *v.* Miller, 3 P. Wms. 356, that a note for 100*l.* being merely a chose in action could not be the subject of a *donatio causâ mortis*. And see Ward *v.* Turner, 2 Ves. J. 442. Hill *v.* Chapman, 2 Bro. C. C. 602. Even the delivery of a trunk has been held insufficient to pass a tally for money contained in the trunk, without express mention of such tally at the time of delivering the trunk, Jones *v.* Selby, Prec. in Ch. 302.

But still, perhaps, if such a delivery be made as, in gifts *inter vivos*, would actually transfer the property in the thing, and give the possession in law, this will be a sufficient delivery to support the act as a *donatio mortis causâ;* for the nature of the thing must be respected in all transfers. Thus in the case above cited, of the gift of the receipts for S. S. Ann. it seemed to be admitted by the Chancellor, that the *transfer* of the stock itself would have been effectual. And, perhaps Lord Hardwicke designed in the case above cited to deny the efficacy of a *symbolical* delivery only where the thing was susceptible of a *specific* and *manual* delivery. The decision of Lawson *v.* Lawson, 1 P. Wms. 441, wherein a man upon his death bed had drawn a bill upon a goldsmith, to pay 100*l.* to A.'s wife to buy mourning, *is* an instance of an effectual appointment in the nature of a *donatio mortis causâ;* and see Tate *v.* Hilbert, 2 Ves. jun. 111, wherein that decision was approved by Lord Loughborough; his Lordship at the same time observing that the report in 2 P. Wms. was incorrect, as it appeared from the Register's book that the direction for mourning was indorsed upon the bill, in the donor's hand-writing. It will be seen also by the cases of Still *v.* Chapman, 2 Bro. C. R. 612., Snellgrove *v.* Bailey, 3 Atk. 214., and Blount *v.* Burrow, 4 Bro. C. C. 75, that both banknotes and even bonds have been held to be capable of a sufficient delivery to constitute a good *donatio causâ mortis*. It would seem by some of the older cases, that the gift must be uncoupled with any condition, Bibby *v.* Coulter, cited in Snelgrove *v.* Bayley, Cas. temp. Lord Hardw. 206. n.: but this opinion is not agreeable to later cases, Blount *v.* Burrow, 4 Bro. C. C. 72.

The principal circumstances which distinguish the *donatio mortis causâ* from the *proper legacy* should be attended to. The points also of resemblance should be carefully marked. And principally on this head, the ambulatory, imperfect, and revocable nature of both will occur as the most important article in which they agree; while on the other hand, the principal difference between them, seems to con-

dispositions in respect to those uses were carried into effect,) if made upon good consideration, a power of disposing by will might be exercised. And if these creations of uses were adopted from the civil law, we may conjecture that our ancestors were led more easily into the practice, by the notions they had previously learned to entertain of a distinction between the legal and beneficial property, from their reservations of the *dominium directum*, abstracted from the *dominium utile*, in their first feudal donations. (5)

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sist in the independence of the title of the donee of the gift *causâ mortis*, on the act or consent of the representative. The same grounds of difference distinguished them in the civil law, *donatio hæc ab additione hæreditatis, sicut legatum, non pendet, sed sola morte confirmatur donantis*. It should be observed also, that a *donatio causâ mortis* differs from the legacy in its exemption from the jurisdiction of the ecclesiastical courts, 2 Vez. 437; and again resembles it in its liability to debts upon a deficiency of assets; see Smith *v.* Cason, at the end of Drury *v.* Smith, 1 P. Wms. 406. It is liable to the duties on legacies, imposed by the late acts of Parliament; and with the Romans it fell under the restraints of the *lex Falcidia* as well as legacies. They are both liable, according to our laws, to be defeated by creditors.

Finally it may be observed, that the fact of the gift *mortis causâ* is, in our law, to be proved in the same manner as other facts are to be proved; whereas in the law of the empire, it was a point of resemblance between this gift and a legacy, that the former was necessary to be proved by five witnesses; which was the number necessary to the proof of a codicil, or any instrument of a testamentary operation not in strictness a testament according to its definition in the civil law.

If the gift be made and authenticated by a written instrument, without any actual delivery, but the deed or instrument conveys an interest to take effect absolutely in possession at the decease of the donor, this cannot be effectuated as a *donatio causâ mortis*, but there seems to be no reason why it should not operate as a testamentary disposition.

(5) There were, besides, many exceptions to this restriction upon the power of alienation by will, arising out of the customs of particular places, which customs are to be regarded as attached to the land itself, and not in the light of personal privileges. Such a power of disposition by will probably belonged always to lands, tenements, and hereditaments holden in gavelkind, by the custom of Kent; for informa-

It is well known, however, that by the statute 27 H. 8. c. 10. this method of virtually disposing of land by will was disturbed. For by that statute the use, as soon as it was created, became the *legal* estate, which was immediately carried to and executed in the *cestui que use,* so that wills lost their operation on the use raised directly upon a feoffment. It was still, however, in the power of individuals to elude the statute, and to keep the legal separate from the beneficial interest, by means of a use raised upon a use, or a second use, which the courts construed to be out of the reach and operation of the act, and thus transferred them to the jurisdiction of equity, under the denomination of trusts. In a very few years afterwards, however, an end was in a great measure put to these artifices, by the statutes of 32 Hen. 8. c. 1. and 34 Hen. 8. c. 5. usually called the statutes of Wills.

By these statutes, all persons having any manors, lands, tenements, or hereditaments, in possession, reversion, or remainder, holden by socage tenure, or in the nature of socage tenure, and having no lands held *in capite,* or by knight's service, were enabled *to devise* all their lands, or any rents, commons, or profits, out of them, to any person, in fee simple, fee tail, for life, or for years, at their pleasure. Those holding of the king *in capite* by knight's service, or by knight's service and not in chief, or of any common person by knight's service, might devise two parts thereof in three, and no more; the other third part being to descend to the heir, for satisfying the duties of the tenure, and, therefore, the

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tion on which species of tenure we must refer the Reader to the justly esteemed Treatise of Mr. Robinson, who makes it appear by several instances that the same custom prevailed in respect of the same tenure in North Wales. The remedy for the devisee to recover lands so devised to him under favour of these customs was usually the writ *ex gravi querela;* which remedy has by the better opinion been thought to be a part of the custom. According to the custom of some places, the bailiff might give seisin, and in others the devisee might enter. Bro. tit. Devise 43. *id.* tit. Custom. 38.

devise of the whole land in such a case would be void. The person holding any such land by knight's service *in capite,* and other lands by socage tenure, might devise two parts of the whole, and no more, or any rent, &c. out of it, at his pleasure. He that held lands of the king by knight's service only, and not *in capite,* (as if a mesne lord by knight's service, had also other lands held by socage tenure,) might devise two parts in three of all the land held by knight's service, or any rent, &c. out of it, and all his socage lands at pleasure. But which disposing power was only to be exercised by a will or testament committed to *writing,* in the *lifetime* of the testator.

By the conversion of military tenures into common socage, the statute 12 Car. 2. 24, brought the greatest portion of the lands of this kingdom within the above-mentioned statutes of Hen. 8. and made them disposable by the last wills of such as possessed them in fee simple. By this statute, which, as the title declares, was "for taking away the court of wards and liveries, and tenures *in capite,* and by knight's service, and purveyance, and for settling a revenue upon his majesty in lieu thereof," all tenures by knight's service of the king, or of any other person, and by knight's service *in capite,* and by socage *in capite* of the king, and the fruits and consequents thereof, were taken away, and converted into free and common socage; and it is thereby enacted, that all tenures thereafter to be created by the king, his heirs or successors, upon any grants of any manors, lands, or hereditaments, of any estate of inheritance, at the common law, shall be free and common socage, and not by knight's service, or *in capite.*

But the tenure by copy of court roll, and the services incident to the same, are untouched by this act of Charles 2. nor do the statutes of Hen. 8. above-mentioned extend to them, as they do not come within the description of socage tenure. The tenure in frank-almoign, and the honorary services of grand serjeants,

other than of wardship, marriage, and the charges incident to the tenure by knight's service, were likewise unaffected by the said act of Charles the Second. (6)

The loose construction of the statutes of Wills.

It appears, however, that there was something to regret in the almost boundless facility which was given to the testamentary power, by the operation of these statutes; in so much that a celebrated writer has remarked, in speaking of the operation of the statute of Wills, that experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law, which are so nicely constructed, and so artificially connected together, that the least breach in any one of them disorders, for a time, the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand-writing of another person were often with very little inquiry allowed to be good wills within the statute.

According to the cases upon this statute, the testament of lands and tenements ought not only to be in writing, but must be committed to writing at the time of the making thereof, or at least in the life-time of the testator; and it was not sufficient to put it into writing, after the testator's death. But if the will were made by parol, and were afterwards written, and then carried to the testator for his approbation, and he approved of it, it was a good will of lands, under the statutes of Henry the Eighth; and it has been held, that if the testator, when he declared his will by word of mouth, had ordered the same to be written, and the will was accordingly written in his life-time, the testament

(6) This Act made some alterations also in socage tenure. It took away the aids *pur file marier*, and *pur faire fitz chevalier*, which were incident to *all* socage tenures. And it relieved socage *in capite* from the burthen of the King's primer seizin, and fines of alienation to the King, to both of which socage *in capite* was equally liable with tenure by knight's service. See Harg. Co. Litt. 93. c. (3).

was as good as if it had been written at first. But, if a man were on his death-bed, and another came to him, and asked him whether his wife should have his land, to which he answered, yes, and a clerk being present put this into writing, without any precedent command, or subsequent allowance of the sick person, this was not a good testament of land, to satisfy the statute of Wills; and if a man declared his will before witnesses, and sent for a notary to write it, and died before he came, and then it was written, this was no good will of lands, though it would have been sufficient, at that time, as a nuncupative will of chattels.

But if a notary took direction from a sick person for his will, and afterwards went away and wrote it, and then brought it again, and read it to the testator, who approved of it, or if it were written from his mouth by the notary, by the direction of the testator himself, although it were not shewn or read to him afterwards, these were held to be valid dispositions of land, under the statutes of Henry the Eighth. And further, it has been held upon these statutes, that if a notary took rude notes or directions from a sick man, which he agreed to, and they were afterwards written fair in his lifetime, and not shewn to him again, or not written fair till after his death, this was an effectual will to dispose of lands. (*e*)

In the case of Laurence *v.* Kete, (*f*) we have the sentiments of the judges much at large, respecting the sufficiency of a will under these statutes. A. being sick, said that he had devised all his lands to his wife, for life, and limited several remainders of several parcels of them, and about an hour afterwards expressed a wish that one K. were there to write his will, whereupon the wife, without acquainting her husband with it, sent for K. who, from the mouth of the witnesses who heard the devise, wrote the same: but because they differed in their testimony, touching the limita-

(*e*) Perk. sect. 476, 477. Dyer, 53. 72. Plowd. 345. 4 Rep. 60.
(*f*) Alleyn Rep. 54.

tions of the remainders, he wrote two wills, and this without the privity of the husband, who, before the writing was finished, became senseless, and presently afterwards died.

And thereupon the following points were agreed to by the Court, and given in charge to the jury: 1st. That an actual devise by word is no sufficient ground for a stranger to write the will, but there ought to be an actual desire expressed to have the will written: nor is a bare wishing sufficient; there should be an actual willing. 2. That this desire ought to be expressed in some short space of time after the devise, so that it may be regarded as one continual act; for if the devise be made at one time, and at another time the devisor sends for a person to write his will, a new declaration will be necessary to make it effectual. 3. That an actual desire of the husband that K. were there to write his will, was a sufficient ground for the wife to send for him, though the devisor gave no express directions to do it. 4. That the writing the will from the mouth of witnesses was sufficient, and it need not be from the mouth of the testator. 5. If witnesses agree as to the devise for life, the will stands good for that, though they disagree as to the limitation of the remainders. 6. Though the devisor becomes senseless before the will be written; yet, if it be written before he dies, it is a good will in writing. 7. If a will continue in writing at the time of the death of the testator, though it be lost or burned afterwards, it stands good: but if it be burned at the time of his death, then the devise is void. The next day the jury gave a verdict against the will, because the evidence was not clear as to the testator's desire to send for K. There was a motion for a new trial, upon pretence of partiality in some of the jurors: but the motion did not succeed.

The case of Stephens *v.* Gerrard (*g*) has been said to have given rise to the clause respecting the signature

(*g*) Sid. 315. 2 Kebl. 128.

and attestation of wills in the statute of Frauds. Some loose sheets of paper were there produced as the will of Sir Edward Worsley, and a title was set up under them in favour of his natural daughter: they were written by one Baynham, an attorney of Gray's Inn. Sir Edward had not signed them: and there was no evidence offered to prove them published, but that of Baynham; whose evidence, according to Siderfin, made it appear, that Sir Edward had dictated a writing made by him, and had caused it to be interlined, and had said that he intended to write it over again himself, but that in the mean time what was written should be his will, though he refused at that time to sign and publish it as such; and the conclusion of it as it stood was as follows, "in witness whereof I have put my hand and seal to every sheet," but in fact his hand and seal were not put to any one sheet; the Court, nevertheless, held this to be a sufficient will, and so the jury found it.

These loose constructions of the statute of Wills, which afforded such facilities to designing persons for practising upon the weakness of men on the bed of sickness, or of forging testaments and supporting them by perjury, when the lips of the party were closed for ever, induced the Legislature to interpose some additional guards for the protection of these last and most solemn dispositions of property. By the statute of 29 Car. 2. c. 3. it was, therefore, enacted, that "all devises and bequests of any lands or tenements, devisable either by force of the statute of Wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses; or else they shall be utterly void and of none effect."

These loose constructions of the statute of Wills called for the formal restraints imposed by the 5th and 6th sections of the statute of Frauds.

It is considered by Swinburn among the advantages of a *written* testament, that the testator has thereby an

It was an advantage of the written will that the contents might be concealed from the witnesses.

opportunity of concealing the contents from the witnesses, which he cannot do when he makes a *nuncupative* testament. For, says he, (after enumerating many of the motives which may rationally influence the testator to keep those in expectancy ignorant of his last dispositions,) in these and the like cases, after the testator has written his will with his own hand, or procured some other to write the same, he may close up the writing without making the witnesses privy to the contents thereof; and shewing the same to the witnesses, he may say unto them, *This is my last will and testament,* or *herein is contained my last will;* and this is sufficient.

Nor, continues he, is the instrument the less available, because the witnesses do not know what is contained in the same, in case the witnesses be able to prove the identity of the writing; that is to say, that the will produced is the very same writing which the testator in his lifetime affirmed before them to be his will: otherwise, the will can have no effect through defect of sufficient proof. The same writer, therefore, recommends, lest the will should fail for want of sufficient proof, when the testator would not have the contents known, that the witnesses should write their names on the back, or on some part of the testament, or use some other means that might enable them to depose and testify undoubtingly, that the same is the very writing itself, which the testator affirmed to be his will. (*h*)

This advantage exists equally under the statute of Charles.

What Swinburn here recommends in practice became soon afterwards the law of the land, by the wise enactments of the statute of 29 Car. II., which, while it gave to the declaration of a man's last will the solemn notoriety of a triple attestation, preserved to testators all the advantages of the written form; for though, by the statute of Charles, the three witnesses must sign in the presence of the testator, it is no more necessary for

(*h*) Swinb. on Test. Part 1. s. 11. God. O. L. 66.

them than for the witnesses who were voluntarily called in by a testator to attest the instrument in writing, under the statute of Henry the Eighth, to be privy to the contents of the instrument.

In Peate *v.* Ougley, (*i*) which was after the statute of Charles, a testator produced to the witnesses a paper folded up, and desired them to set their hands to it as witnesses, which they all did in his presence, but they did not see any of the writing, nor did he tell them it was his will, or express what it was: but it was all written with the testator's own hand. It was objected that this was not a good execution of the will within the statute; for that it was not enough that the witnesses wrote their names, they ought to attest the signing by the testator, or at least the publication of the will; but that the testator neither signed the will in their presence, nor declared it to be his last will before them. On the other side it was insisted, that the execution was sufficient within the statute; for that there was no necessity for the witnesses to see the testator write his name; and, if he wrote these words, *signed, sealed,* and *published* as his will, and desired the witnesses to subscribe their names, it was a sufficient publication of his will, though the witnesses did not hear him *declare it to be his will.* And Trevor, J. was of opinion that there was sufficient evidence of the execution.

But the case of Trimmer *v.* Jackson (*k*) went further; for there the witnesses were so far removed from a knowledge of the *contents,* that they were actually deceived as to the *nature* and *purpose* of the instrument, which they were led to believe, from the words used by the testator at the time of the execution, was a deed, and not a will. It was delivered as his act and deed; and the words 'sealed and delivered' were put above the place where the witnesses were to subscribe their names; but in consideration, as it is said, of the in-

(*i*) Com. 197.

(*k*) Cited by Denison, J., in Wallis *v.* Wallis, 4 Burn. Eccl. L. 127.

convenience that was possible to arise in families from its being known that a person had made his will, it was adjudged by the Court that this was a sufficient execution.

According to these cases it not only appears to have been the opinion of the Courts that it was unnecessary that the witnesses should be privy to the contents of the will since the statute of Charles, (as it certainly appears to have been held upon the statute of Henry the Eighth,) but they seem to have carried the allowance beyond the cases, (loose as they appear to have been,) which were determined upon the statute of Wills; for, as we learn from Swinburn, the authorities go no further than to shew, that one of the advantages of the written testament over the nuncupative method, (which was still permitted, where, by the customs of particular places, lands were devisable) was the opportunity it gave to the testator to make an effectual will, without disclosing the contents even to the witnesses, which was a concealment oftentimes of importance to the peace of families; but then the identity of the will ought to be proved: and therefore, it seems to have been a common idea with the writers upon the subject of wills previous to the statute 29 Car. 2., that the nature of the instrument or writing ought to be announced or published by the testator to the parties present.

A reliance upon the security derived from the attestation by three credible witnesses in the presence of the testator may account for the little importance attributed by some of the judges to the publication of the will by the testator; so little indeed, as to deem it unnecessary for him to announce or declare to the witnesses the nature of the instrument they were to sign.

In the case of Wallis *v.* Wallis, (*l*) wherein both Trimmer *v.* Jackson, and Peate *v.* Ougley, were cited, there seems to have been some doubt on the subject of

(*l*) 4 Burn. Eccl. Law, 127.

publication. The case, however, though argued only at the assizes, shews the opinion of Mr. Justice Denison, as to the necessity for the witnesses to know what instrument they were signing, to be in correspondence with that of Lord Mansfield and the judges who decided the case of Trimmer *v.* Jackson.

It may be considered, therefore, that the law stands settled according to these cases, notwithstanding what fell from Lord Hardwicke in Ross *v.* Ewer (*m*) as to the necessity for publication.

We shall dismiss this Chapter with observing that a will may be written on any material, or in any language, so as, if it concern property in England, it be framed with the solemnities required by the English law. (*n*)

(*m*) 3 Atk. 161.
(*n*) Swinb. p. 4. s. 28. 1 Vern. 85.

CHAP. II.

TESTAMENTARY CAPACITY.

SECT. I.

Capacity of disposing.

THERE has been some diversity of opinion concerning the age at which the testamentary capacity as to personal estate takes place: but the doctrine that it commences in males at fourteen, and in females at twelve, seems most to be relied on; (*a*) and, in computing an infant's age, it appears that the day of his birth is to be reckoned inclusively. (*b*) Of lands, no person can make a will till twenty-one, by the words of the statute of Wills, unless by the special custom of particular places. (*c*) And it seems that no custom can enable a male infant to make *any* will before he is fourteen years of age, (*d*) for no custom can abrogate the law of nature.

A woman whose husband is banished for life by act

(*a*) Harg. Co. Litt. 89 b. Swinb. 114. 2 Mod. 315.

(*b*) 1 Sid. 162.

(*c*) Godolph. Orph. Leg. 21. Perk. 221. S. 504. 3 Atk. 711. If there be a local custom that all lands within a certain precinct shall be devisable by all manner of persons at the age of fifteen, it is good. But as being against commonright, it must be within a certain fee, or borough. Rob. Gav. 225.

(*d*) Law of Ex. 153.; and see 2 And. 12., where it is said that a custom enabling an infant under fourteen, (at which age, and not before, the law supposes some discretion,) could not be good.

of parliament, may make a will, and act in every respect as a feme sole. (*e*)

Capacity of married women.

But regularly, a woman under coverture cannot make a will, either of lands or goods, not even of her paraphernalia. (*f*) These last however, become absolutely her's upon her husband's death, and in the mean time are not subject to his disposition by will; (*g*) though he may sell or give them away in his lifetime. (*h*) With the licence and consent of the husband a wife may make testament of her own, (*i*) and it is said, even of the husband's goods: (*k*) but he may revoke the same, not only during her life, but, according to Swinburn, after her death, before the will is proved. If, however, he confirm it after her death, he can never afterwards rescind such confirmation. But such an instrument is not entitled to be called, in strictness, a will, until it has been proved in the Ecclesiastical Court as such. (*l*) And without such consent of the husband, the wife has no legal power of making any testamentary disposition of her *own* chattel property, not even of her debts and choses in action, which are not divested out of her by the marriage, and do not survive to the husband.

The law having placed the wife in a state of subjection to her husband, follows up its principle by supposing all acts done by her to be done under constraint,

(*e*) 2 Vern. 104. 2 Bro. C. C. 385.

(*f*) *Viz.* her bed, wearing apparel, and ornaments of her person, if suitable to her husband's state and quality. See Moor, 213. 2 Leon. 166. 1 Roll. Abr. 911. Cro. Car. 343.

(*g*) 3 Atk. 394. 1 P. Wms. 730.

(*h*) And if he leave a deficiency of assets, they will be subject to the payment of his debts. 1 P. Wms. 730. 17 Ves. Jun. 273. 2 Atk. 104. Though if a husband pawn a wife's paraphernalia and die, leaving a fund sufficient to pay all his debts, and to redeem the pledges, she is entitled to have them redeemed out of his personal estate. 3 Atk. 395. As to the right of the wife to stand in the place of creditors who have been paid by means of her paraphernalia, see Tipping *v.* Tipping, 1 P. Wms. 729. Tynt *v.* Tynt, 2 P. Wms. 542. 8 Ves. 397.

(*i*) Cro. Car. 219. (*k*) Swinb. 89.

(*l*) 2 Atk. 49.; and see Ross *v.* Ewer, 3 Atk. 156.

and to be in effect the acts of her husband. Being without free agency it cannot be known how far her will has operated in any act of disposition concerning property. It may be stated, therefore, as the general rule, that a wife is incapable of devising to her husband, as well as to others; for the devise by a wife to her husband would be little different from a devise by him of her property to himself. (*m*)

Nor does it seem that there can be a good custom in any place for such a power of devising by a wife. (*n*)

In equity, however, effect is frequently given to the testamentary dispositions of a wife. If a husband be under a contract made before marriage to consent to the wife's disposition of her property by her will, she may, in virtue of such ante-nuptial agreement, thus dispose of her personal or real estate; (*o*) and the husband has no power to recal or withdraw such consent. If such contract, however, be made after marriage, it will not bind the wife's heir. As to her freehold estate, such consent after marriage would clearly have no operation at law, and a court of equity would refuse to convert the heir at law into a trustee for the wife's testamentary appointee. (*p*) The same distinction holds where the wife is *cestui que trust* of her real property. If the agreement be made before marriage, giving her a disposing power over her estate, her disposition of her trust property will be good against her heir, but the descent to such heir will remain unbroken if the consent be posterior to the marriage.

In these respects, a material distinction obtains between freehold and chattel property. The simple assent of the husband after marriage may give effect

(*m*) Godb. 15. 15 Bro. tit. Test, 13.

(*n*) Skepwith's case, Godb. 14. pl. 22. Ibid. 143, pl. 178. Moore's Rep. 123, pl. 268. Stevens *v.* Tyrrel, 2 Wils. 1.

(*o*) Wright *v.* Cadogan, 1 Bro. C. C. 486. Rippon *v.* Dowding, Ambl. 565.

(*p*) Wright *v.* Englefield, Ambl. 468. Dillon *v.* Grace, 2 Scho. and Lefroy, 463.

to a wife's disposition by will of her personalty, as against her nearest of kin: but such post-nuptial consent will not qualify her to dispose by will of her real estate to the disappointment of her heir. And if her disposition by her will of her personal property emanate from the bare assent of her husband, it is necessary to its effect that the husband should survive the wife; for the operation of such consent consists in its being a waiver by the husband of his right to administer to his wife; so that if he dies before his wife, the will is void against her next of kin. (*q*)

Where an estate is merely limited to the separate use of the wife, unaccompanied by any express power of disposition, the following distinctions are very important. If a freehold estate be so limited to the wife's separate use, she cannot dispose thereof during the marriage, except by the specific modes of fine or recovery, so as to exclude her heir, though of the rents and profits she undoubtedly has a full and free right of disposition, as she also has of her personal estate so settled. As to real estate, the case of Hulme *v.* Tenant (*r*) has determined this point; and since the case of Fettiplace *v.* Gorges, (*s*) it may be regarded as a decided rule of property that when personalty of any kind is settled upon a married woman, whether by a contract to which her husband is a party, or by the settlement or gift of other persons, she has the same power over it in equity as if she were a single woman, without any express provision to that effect: for courts of equity consider that if she takes personal property to her separate use, she takes it with all its incidents, of which the *jus disponendi* is obviously one of the most essential. And where she has this power over the principal, she by consequence has it over its produce and accretions. (*t*)

(*q*) Stevens *v.* Bagwell, 15 Ves. Jun. 156.; and see Scrammell *v.* Wilkinson, 2 East. 552.

(*r*) 1 Bro. C. C. 16.

(*s*) 1 Ves. Jun. 46. 3 Bro. C. C. 8.

(*t*) Gore *v.* Knight, 2 Vern. 535. Hanning *v.* Style, 3 P. Wms. 338.

Thus, it may be considered as well settled, that if there is no restraint expressly imposed upon a wife as to her enjoyment or control of her separate personal estate, courts of equity allow her to dispose of it as she pleases, either by granting or encumbering it, even where the property is so settled without any particular power. But, in analogy to the common law, equity will not allow her *general* contracts to bind her separate estate. At law, her inability to sue or be sued in respect of her separate property, upon her contracts, has been well settled by late cases. (*u*) And equity follows the legal principle to the extent of holding the separate property of a married woman untangible by her *general* creditors during her life; though it appears that after her death such creditors are let in upon her separate estate, whether they claim by specialty or simple contract, *pari passu*. (*x*)

Over her real estate also a woman while sole may reserve to herself a power either at law or in equity, to be exercised by her while under coverture; at law, by virtue of a power over a use,—in equity, through the medium of a trust. If she convey an estate before marriage to the use of herself for life, remainder to the use of such person or persons as she shall by any writing, &c. appoint; such power may be exercised by her during coverture.

Before the statutes of Uses, these powers being mere modifications of uses, depended for their effect on the jurisdiction of courts of equity; for before those statutes courts of law could take no cognizance of the uses arising upon conveyances, or the considerations out of which they sprung. They affected the conscience only. But after the statute of the 27 Hen. 8. had carried the possession to the use, and thus made the use the legal estate, powers being in their nature uses, and in their exercise the disposition of legal estate, became of course cognizable in the courts of common law. A power,

(*u*) See Marshal *v.* Rutton, 8 T. R. 547.
(*x*) 18 Ves. Jun. 258.

when executed, takes its effect just as if the particular limitation determined by the appointment had been expressly contained in the original instrument by which it was created: its efficacy is derived out of the estate of the author of the power at the time of its creation, and consequently its validity must be determined with reference to the ability of such person at the time of creating it. If the author of the power, therefore, was a feme sole at the time when the settlement originating the power was made, she gave it birth when she was fully competent so to do, and when she was at liberty to make any contract respecting her property; and if the power is afterwards executed by her when no longer *sui juris*, being *sub potestate viri*, she merely nominates the person to take by virtue of the original disposition: who accordingly derives the estate immediately from the settlement which virtually and potentially comprised the limitation ascertained by the appointment.

The same object may be obtained by the creation of trusts, instead of by legal uses subjected to a power of appointment;—as if a woman, having before marriage a freehold estate in fee-simple, convey the same to *trustees*, in trust for herself during her coverture, for her separate use, and after her decease in trust for such person as she shall by deed or will appoint, and in default of appointment, to her heirs, and afterwards marry, and then exercise her power by her will, such will is properly a declaration of trust, and will be supported as such in equity. And these powers or trusts may be created after marriage by such modes of assurance as will bind a wife's property, as by fine levied, or recovery suffered, if she is properly included, and secretly examined as to her consent.

Where she makes a will in execution of a power, though this is not in strictness a will, yet it is an act of a testamentary nature, and must be sanctioned in the Spiritual Court, or the legatee cannot entitle himself in a court of law; and the course is not to give probate of

the will, but administration with the will annexed, as a testamentary paper. (*y*) Before the case of Wright *v.* Cadogan, (*z*) it was well established that a feme covert might have power to dispose of land by writing in the nature of a will, so as to bind the heir, by reserving to herself on her marriage such right by way of trust, or a power over a use: but by that case the doctrine was carried further; for there, articles having been entered into before marriage, whereby it was stipulated by the husband that all the estate of his future wife, which she then had, or which at any time should descend or devolve upon her, should be conveyed to her own use, and subject to her appointment, it was adjudged that an appointment executed by her in favour of her husband, and her children by him, was a good appointment against the heir, although no conveyance was ever executed, nor any fine levied of the reversion. (*a*)

Of the goods which the wife has as executrix, she may make an executor without her husband's consent. (*b*) But her power does not extend to any beneficial interest which she may have in them; it is confined to the personal assets, as accompanying her office of executrix. It is a power only of continuing by transmission the representative capacity vested in her independently of her husband. (*c*)

The terms of years and other chattels real of the wife, as estates by statute merchant, elegit, &c. are in the power of the husband to dispose thereof by grant or demise, but not by will during the coverture, against his wife surviving him; and they become his property if he survive his wife, in virtue of his marital right, and not as her representative. If he make a will, disposing of them, and then survive his wife, his in-

(*y*) Stone *v.* Forsyth, Dougl. 707. Ross *v.* Ewer, 3 Atk. 156. Jenkin *v.* Whitehouse, 1 Burr. 431. Cothay *v.* Sydenham, 2 Bro. C. C. 392.

(*z*) 6 Bro. P. C. 156.

(*a*) See the notice taken of this case in Doe *v.* Staple, 2 T. R. 684.

(*b*) 11 Vin. Abr. 141. (*c*) 15 Ves. Jun. 156.

terest will pass by such will. If he make no disposition of such chattels real, or only a disposition by will, and die in his wife's lifetime, they vest in her by survivorship. And it is to be observed, that they will in such case belong to her independent of the husband's incumbrances; so that if he have granted a rent or annuity out of her chattels real, her right by survivorship will not be affected by it, (*d*) being a paramount and elder right, and therefore to be preferred to that of any person claiming any collateral and junior interest in the subject: but if the husband assign, or even agree to assign the term itself, or any part of it, though only as a security for a debt, the wife is bound by such act of legal or equitable, total or partial, alienation. (*e*) And if the husband have made an underlease of any part of the wife's term in her lifetime, reserving a rent to himself, she is bound, notwithstanding her survivorship, during the continuance of such demise, the benefit of which will go to the devisee, or personal representatives of the husband, together with any arrears of rent due at his death; the residue, or reversionary interest(*f*) being all that she would be entitled to. Even should the wife be joined in such underlease, still, if the rent be reserved solely to the husband, the same consequences as above last adverted to would follow: but if the rent upon such joint underlease were to be reserved to them both jointly, it is said that the wife surviving would be entitled both to the accruing rent and the arrears. (*g*) If the wife have before her marriage subjected her chattels real to any *bonâ fide* charges, and the husband survives, he must take them so encumbered; (*h*) but she is, of course, unable, by her personal

(*d*) Co. Litt. 184 b. 351.

(*e*) 2 Atk. 207. It may be as well to notice here that if a woman, joint tenant of a term, marry, and die before her husband, before he has done any act to sever the jointure, which he might have done, the term vests wholly in the surviving joint tenant, the husband taking no interest as such. Co. Litt. 185.

(*f*) Sym's case, Cro. Eliz. 33. 6 Ves. Jun. 389.

(*g*) 4 Vin. Abr. (D. a.) 117. (*h*) 7 Ves. Jun. 174.

covenants or engagements made after her coverture, to bind her husband surviving. (*i*)

The law is curious upon this head: but as it has already been far enough pursued for our present purpose, we shall only advert below to some of the cases in which may be seen the various modes whereby, without any positive act of alienation, the husband may constructively so act upon his wife's chattel property as to defeat her title by survivorship. (*j*)

Mental incapacity, fraud, duress.

No person who is not of a reasonable mind and sane memory can make any disposition by will: consequently an idiot, or natural fool, being one without understanding from his nativity, and therefore presumed never likely to possess any; (*k*) or a person deprived of his faculties by extreme age, (*l*) or by intoxication, while the paroxysm endures, is not of testamentary capacity in the law. (*m*) For the same obvious reason a lunatic is incapable of disposing of his property by will, except in his lucid intervals, if they occur; and they must be calm and clear intermissions, attended with quietness and freedom of mind.

A case some little time ago was determined in the Prerogative Court relative to the validity of a will, which may help to illustrate these points.

A will of F. E., Esq. was propounded by S. S., spinster, named an executrix therein, and opposed by the widow and son of the testator.

It appeared that Mr. E. was a gentleman of respectable connections, and that family differences had produced a separation by mutual consent between him and Mrs. E. From that time Mr. E. took up his residence

(*i*) 7 Ves. Jun. 174.

(*j*) 1 Roll. Abr. 345, pl. 10. Co. Litt. 46 b. 2 Roll Abr. 495, pl. 50. Cro. Eliz. 912. 1 Vern. 396. 2 Leon. 104. See also how the wife's title may be defeated by the husband's legal liabilities, as by forfeiture, attainder, eviction, or civil execution. 1 Roll. Abr. 851, pl. 50. Co. Litt. 351. 4 Bla. Com. 387. 1 P. Wms. 258.

(*k*) Co. Litt. 42 b.

(*l*) Marquis of Winchester's case, 6 Rep. 23.

(*m*) 8 Ves. 65. 9 Ves. 478. 12 Ves. 445.

in various parts of England, and being in want of a person to superintend his domestic arrangements, he, in May, 1806, made choice of Miss S. for that purpose. He was shortly afterwards seized with a paralytic affection, from the effects of which, added to the increasing infirmities of age, he suffered greatly. Through the interference of his son at this juncture, a reconciliation was effected between the deceased and his wife, and he accordingly invited her to take up her residence with him. In October, 1807, she complied with this invitation, and then found Miss S. officiating in the superintendance of Mr. E.'s domestic affairs: but she quitted the house in November following, in consequence of the criminal intimacy which she suspected to exist between Miss S. and Mr. E. Mr. E.'s health declined considerably. The will, it appeared, was drawn up by the deceased in the summer of 1809. He kept it by him until the 5th of July, 1810, when he ordered his carriage, intending to drive to the house of his friend C.: but meeting him on the road, they returned together. They proceeded into Mr. E.'s library, where he told Mr. C. he had a favour to ask of him, as he was going to make his will, and leave him an executor;—and, pointing to a drawer in the table, said he would find the will there; adding, how necessary it was not to be without a will, but particularly for him.

Lucid intervals.

The will was then produced, and purported to devise the testator's freehold property to his son, subject to the settlement made on his marriage. It also gave an annuity of 600*l.* to Miss S., and any house the testator might reside in at his death, with the furniture, plate, linen, horses, carriages, &c.; concluding with a bequest to her of all the rest of his personal property, and appointing her and another executors. Mr. E. then desired Mr. C. to draw up the codicil, appointing himself an additional executor, and giving him and the other executors 500*l.* each for their trouble, which he accordingly did; and both papers were then executed

in the presence of Mr. S., Miss S.'s father, and another witness.

The validity of these two instruments was opposed by the son, upon the two grounds of an undue ascendancy exercised over the testator's mind by Miss S., and his total incapacity, as well at the time of making the will, as before and subsequent to it; and in support of this a variety of circumstances were adduced. It was stated that Miss S. had taken advantage of the deceased's infirmity of mind to produce a criminal connection between them; that they afterwards lived in open adultery; that she introduced her father and mother into the house as inmates, and endeavoured to estrange his affections as much as possible from his son, and his family; that they conspired together to obtain the deceased's property, and treated him as insane, as in fact he was; that in the spring of 1810, he began to commit the most extravagant acts, of which many were brought forward in proof. Several letters, also, pompously and improperly addressed, and otherwise indicative of insanity, were produced, as having been written to persons with whom he had formerly corresponded in the most accurate manner, and by whom he was esteemed,—as in truth he had been till then, a man of uncommon judgment. It was then added that he was shortly afterwards placed in the care of keepers; and in November following, a commission of lunacy having issued, an inquisition was held, and the jury returned a verdict of insanity without lucid intervals, from the 1st of July preceding, five days prior to the transaction of the will. He was then removed to Dr. Willis's, at Hoxton, where he died in October, 1811.

In reply to this, circumstances were adduced on the part of Miss S. to shew that she possessed the confidence of the deceased, but without any undue means; that his displeasure was very great against his son for not coming to see him, and that he often declared it

would be thousands out of his way;—that Miss S.'s connection with the deceased, far from being notorious, was hardly known, and her father was introduced into the house to manage the deceased's farming concerns, with a salary of 40*l.* per annum, only on account of the deceased's good opinion of his skill in those matters: that the deceased continued of sound mind, managing his affairs, and drawing drafts on his bankers, until the 12th of July, 1810; and even wished Miss S. to go with him the day the will was executed, excusing her solely on account of ill health.

A great mass of evidence was adduced in proof of these different representations of the case on either side, and the arguments of counsel were heard at great length thereon, during three days; it being contended, on the one hand, that there was no proof of undue influence or control over the deceased, but that the will was the spontaneous act of a capable testator; and, on the other hand, that not only an undue control was proved, but that there was also actual and positive incapacity, for a period long antecedent and subsequent to the making of the will, as well as at the very time.

The learned Judge(*n*) recapitulated the circumstances of the case. He was of opinion that the acts of extravagance committed by the deceased, coupled with the verdict of the jury upon the inquisition, left no doubt of the deceased's having been afflicted with insanity. Where there was, *prima facie,* no proof of this, the presumption of law was always in favour of the testamentary act; but when it was otherwise, the *onus probandi* was thrown upon the party setting up the act; and the question, therefore, in the present case was, whether the papers propounded were executed by the deceased during a lucid interval. He proceeded to an examination of the doctrine of lucid intervals, as laid down by Lord Thurlow,—that positive proof must be

(*n*) Sir John Nicholl.

shewn of the disorder having been wholly thrown off for the time: that there must be a complete interval of sanity, applying to the particular act in question; for if there was but a single word "sounding the folly," it was conclusive against the presumption of a lucid interval sufficient for legal purposes. Collateral circumstances, however, such as whether the act was a natural disposition, or in favour of persons exercising an undue control, might considerably influence the enquiry, as they were material to shew the probability or improbability of the act's being the spontaneous exertion of the deceased's mind; and the present case was, therefore, to be examined upon these principles. He then entered into the private history of the deceased and Miss S., observing that, with all the Court's caution in listening to the evidence of servants in the house, still these circumstances must have their weight. They were, however, strongly confirmed by the account given of the deceased's incoherent correspondence; and the very fact of his wishing his wife and son to visit him when living in a state of open prostitution with this girl, was in itself a proof of insanity. Looking then, at this evidence, it was not only sufficient to throw the burden of proving capacity upon the parties setting up the will, but it likewise proved the influence they exercised over the deceased; and it would be difficult to imagine the evidence that would be sufficient to sustain a will under such circumstances. Mr. S. must have, known of his daughter's prostitution; and this, added to his general conduct, did not go to confirm his attestation of the act in question. Mr. J. and Mr. C. were both renouncing executors, and had released their legacies; the latter was also the writer of the codicil in his own favour. It was therefore probable that they had expectations from the bounty of the executrix; and though this was not sufficient to discredit them, it must necessarily raise the suspicion of bias. There was no reason to believe that the deceased's declarations of having made his will

referred to either of the papers in question: and they had the effect of disinheriting his son from one considerable part of his property, only to make an unreasonable provision for a woman with whom he lived in public adultery. The will itself bore strong internal marks of confusion and irregularity, and appeared to have been copied from some other not before the Court. It was written very irregularly, with some names partly omitted in places, and others repeated in a varied manner, altogether shewing the deceased's confusion at the time; and, in the language of Lord Thurlow, "sounding his folly." So far, therefore, from any lucid interval being proved, there was every presumption of the continuance of the disorder, a presumption confirmed not only by the general state of the evidence, but also by the contents and appearance of the will itself. The Court was, therefore, bound to pronounce against its validity; and considering the active part taken by Miss S. in this transaction, with all its attendant obloquy, the Court felt that it would not sufficiently mark its disapprobation of such practices, and hold out a discouragement of them for public example, did it not condemn her in the costs incurred. Costs decreed accordingly.

If a will by a lunatic be rationally drawn up, and the nature of the disorder be such as to afford any reasonable ground to suppose that a lucid interval may have prevailed, the very act itself furnishes an evidence not easily resisted, of that sound and disposing mind which is necessary to its validity. The proposition of Lord Thurlow in the Attorney-General *v.* Parnther, (*n*) that where lunacy was once established by clear evidence, the party ought to be restored to as perfect a state of mind as he was in before his disorder, to make a good will, was denied by the present Lord Chancellor, who observed, that we might suppose the strongest mind reduced by the delirium of a fever, or any other cause,

(*n*) 3 Bro. C. C. 441.

to a very inferior degree of general capacity; and yet he might be competent to the making of his will, especially of personal estate. (*o*)

What fell from the late Sir William Wynne in his judgment in the case of Cartwright *v.* Cartwright (*p*) and Others, expounds the law upon this point with great clearness and precision. There the testatrix wrote her will without any collateral circumstances to indicate the fact of a lucid interval, and with her hands loosened from their ligatures for the purpose. She was alone while she performed the act, though observed through an aperture by persons in an adjoining room; who deposed that, while engaged in doing it, she frequently left off writing, threw the torn pieces of paper in the fire, and walked about the room in a wild and disordered manner. But the paper itself had no mark of irritation: whatever outward appearances of disorder there might have been, it had no effect upon the writing itself, which was a perfectly steady and correct performance, entirely consistent with her attachments, impressions, and habits, when in a sane condition, and written without a single mistake or blot. Upon this state of the case Sir William decided for the validity of the will, grounding his judgment on the following principles:—"I take it the rule of the law of England is the rule of the civil law, as laid down in the Second Book of the Institutes,—*Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur.* If you can establish that the party afflicted habitually by a malady of the mind had intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it: but the effect of it is this,—it inverts the order of proof and of presumption; for, until proof of habitual insanity is made, the presumption is that the party agent, like all human creatures, was rational. But

(*o*) 11 Ves. Jun. 11. (*p*) 1 Phill. 90.

where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it. That is the law: so that in all these cases the question is, whether, admitting habitual insanity, there was a lucid interval or not, to do the act.

Now, I think, the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself: that I look upon as the thing to be first examined; and if it can be proved and established that it is a rational act, rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to shew the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further; and so Swinburne states it. The manner he has laid it down in Part ii. sect. 3. is thus:—"If a lunatic person, or one that is beside himself at some times, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or not, then, in case the testament be so conceived as that thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good: yea, although it cannot be proved that the testator used to have any clear and quiet intermissions at all, yet nevertheless I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament."

Unquestionably there must be a complete and absolute proof that the party who so formed it did it without any assistance. If the fact be so that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I do

not know, unless the gentlemen could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. All that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient."

Incapacity from general exhaustion and extreme debility.

When the mind of a dying person is reduced by the stress of his malady, or by general exhaustion, to such a state of mental depression and debility as to be incapable of a determinate testamentary act, a paper signed by him as his will under such circumstances will be rejected by the Ecclesiastical Court; especially if such instrument contain internal evidence of intellectual weakness, and disturbs the settlement of the testator's affairs by a former well considered will made by him when in the entire possession of his mental powers. (*q*)

Will in part void from incapacity.

Mental incapacity may invalidate only part of a will, as in a late case, (*r*) where a testator wrote the first part of what was propounded as his will with his own hand, but the concluding part was written by the executor, who was principally benefited, and who was the active agent in bringing the witnesses to the house of the deceased. According to the evidence, the deceased was so worn out that he could not complete his will: but there was no proof of any actual incapacity which could be set against the inference from his writing his intentions sensibly and intelligibly to a certain extent. It appeared, however, that after this effort his capacity was not so alive as to prevent him from executing an instrument of the contents of which he was not aware; and it was not in evidence that he gave any instructions for the part of the paper which was written for him, or that it was read over to him after it was written.

(*q*) See the case of Brouncker & Cooke *v.* Brouncker, 2 Phill. 57.

(*r*) Bellinghurst *v.* Vickers, 1 Phill. 187.; and see Wood *v.* Wood, 1 Phill. 357.

The rule is clear that there must always be the *animus testandi,* or the instrument purporting to be a will is of no effect in the law. The party must also be free, and under no compulsion from such threat or violence as may reasonably be supposed to move a constant man, for the words of the stat. 34 Hen. 8. are —"at his free will and pleasure." But if, when the fear is past, or the restraint removed, the testator confirms the will, it is made good. (*s*) So likewise wills, procured to be made by artful misrepresentations and fraudulent contrivance, are void. (*t*) And the question as to the existence of fraud, in cases of real estate, is properly examinable in courts of law, on an issue of *devisavit vel non:* but fraud as to a personal will belongs to the jurisdiction of the Spiritual Court.

If infancy, non sane memory, idiocy, coverture, or duress, exist at the inception of a will, it is absolutely void, though the disability should happen to be removed before the consummation by death; for there must be a good inception, and the party must be qualified when the will is made. (*u*) If there be no disability when the will is made, a subsequent loss of intellect will not revoke it. But the will of a woman is revoked by her subsequent coverture, as will be seen in a future part of this Work.

How affected by conviction, attainder, outlawry, and self-murder.

Persons attainted of treason forfeit lands and goods; and are of course incapable of disposing of them by their wills, as against the Crown, though their wills cannot be disputed by their representatives. So a felon, upon attainder, forfeits the fruits of his lands for the year and the day; after which they escheat to the lord of the fee. But the forfeiture of goods and chattels is absolute, as well in felony as treason; differing from the forfeiture of lands in respect of its commencement, the latter taking place upon the attainder, and not before; the former upon the conviction. If, therefore,

(*s*) Swinb. 475. (*t*) Styles, 427.

(*u*) Plowd. 343. Raym. 84. 1 Eq. Ca. Abr. 171, 172. 1 Sid. 162. 11 Mod. 157. 2 Eq. Ca. Abr. 357.

the party dies, before attainder in the one case, and conviction in the other, the forfeiture is saved; and his will either of lands or goods is effectual. But if conviction or attainder takes place, the will of the traitor or felon, as to his goods, by the conviction, and as to his real estate, by the attainder, is rendered void; and *that*, although such will was made before either the conviction or attainder. The King's pardon restores the disposing capacity; and the party may afterwards make his will, as if no conviction had taken place: and it seems, that by such pardon, any will made before conviction recovers its former force and effect; (x) though it may be doubted whether a will or testament made after conviction would be rendered operative, as not having had a legal and valid inception. The will of a *felo de se* may, it seems, be effectual, as to his lands, because these are not forfeited but by attainder, which cannot be in this case. But as to his goods and chattels his will is of no effect. (1)

Wills of aliens.

An alien enemy, without the King's licence to reside in this country, is incapable of making any will. But an alien enemy with such licence, and an alien friend without any such licence, may bequeath personal estate. Either description of alienage incapacitates for *holding* land, and consequently for devising it. But leases of houses for habitation may be held by alien friends, and

(x) Swinb. 97.

(1) Plowd. Com. Eng. Ed. Hales *v.* Petit, and observe the subtle grounds on which this point was there reasoned. By the early jurisprudence of Rome a will was not only not invalidated by the suicide of the testator, but it was not uncommon for persons to prevent the confiscation of their property which would otherwise follow upon capital punishment by killing themselves; and the validation of their wills under such circumstances according to Tacitus, Annal. lib. vi. s. 29. was the *pretium festinandi*. But this *pretium festinandi* was taken away altogether by the later emperors. And the wills of persons committing suicide were only allowed to have effect where the act of self-destruction was occasioned by impatience of pain or loss of reason. Cod. lib. vi. tit. 22. s. 2.

alien enemies with licence, provided they are not artificers or handicraftsmen, and will pass by their wills. (*y*)

One who is outlawed in a personal action forfeits his goods, and is therefore incapable of disposing thereof by his will; though it seems he may devise his lands. (*z*) But it is to be observed that the wills of traitors, felons, aliens, and outlawed persons, are void only as to the King or lord of the fee, who has the right to the lands or goods, by reason of the forfeiture: the will is good as against all other persons.

Incapacity from defect of title, or seisin.

There are certain other disqualifications which may be called real rather than personal, inasmuch as they arise rather from a defect of estate, than a disability of the person; and yet, as the obstruction does not proceed from the want of a devisable quality in the thing, but the want of such an interest in it as consists with the devising power, the subject seems properly to come within the present Section. Under this head we will first consider the incapacity from not having, or not being seised of, the lands or hereditaments attempted to be devised.

Some eminent lawyers (*a*) have grounded the necessity which exists for the testator's being seised of the lands at the time of making his will, upon the words of the statutes 32 & 34 Hen. 8., that every person *having* lands may devise them: but later authorities have considered this rule as older than the abovementioned statutes of Henry the Eighth; for, according to all the precedents, the inefficacy of a will to pass lands whereof the testator was not seised at the time of making it, applied as well to devises by custom as to wills made under the authority of the statutes. And it was observed by Lord C. J. Holt in Bunker *v.* Cooke, (*b*) that it ap-

(*y*) 1 Bl. Com. 372. Harg. Co. Lit. 2 b. n. 8.

(*z*) Swinb. 107.

(*a*) See the case of Brett *v.* Rigden, Plowd. 344, where Lord Dyer grounds the reason of this rule upon the force of the word "*having*" in the stat. 32 Hen. 8.; and see 3 Rep. 31., and Str. 27.

(*b*) Rep. temp. Holt, 248. 1 Salk. 237. Fitzg. 232.

peared by the precedents, wherein it was uniformly averred that the testator was seised in fee, and that being so seised he made his will, to be absolutely necessary that the devisor should be seised in fee at the time of making his will.

If, therefore, a testator devises all his lands, and afterwards purchases other lands, and dies without making a new will, or republishing his former will, such after-purchased lands will not pass. In the case of Brett *v.* Rigden, in Plowden's Commentaries, it was said by one of the Serjeants *arguendo*, that the effect was different where the devise was of lands specially mentioned and intended to be purchased, as in such a case the intent was manifest. But this position was in the abovementioned case of Bunker *v.* Cooke denied to be law by the Chief Justice, who added that he had looked into the case quoted in the margin, and had found nothing in it to warrant the distinction.

Distinction between freehold and chattel property in this respect.

The distinction between freehold property and goods and chattels, as to the transmissible right in them, and the appointment which the law makes in respect of the succession, is of very early date, though it seems to be a consequence of the introduction of feuds. With respect to mere personals the law appointed no successor, but the right to dispose of them devolved upon the Church in case of the owner's intestacy. If the owner made his will, and appointed an executor, such executor was the heir to the testator's goods constituted by him to supply the omission of the law.

All the personal property either belonging to the testator at the time of his making his will, or acquired by him at any time afterwards, devolved upon the heir of the testator's own appointment, no person being appointed by designation of law to whom it would otherwise descend, and therefore no previous or inceptive interest being displaced to make way for the object of the testator's express adoption. By the appointment of an executor, therefore, all the testator's goods and chattels must in the first place devolve upon him; for by

making an executor, he primarily gives all to him, his legacies being only so many trusts which the ecclesiastical courts and courts of equity will see performed. Even his specific bequests must have the executor's assent before they can be said properly to belong to the legatee.

But with respect to freehold property, when feuds became inheritable, the law assigned the heir, whose title was inchoate at the moment of the acquisition of the property by the ancestor. The heirs were comprehended in the conveyance of the fee simple. The disposition, therefore, by will, of freehold estate was no appointment of the heir; but, on the contrary, a removal of his title: it takes the succession from him whom the law had made the heir, destroys his inchoate right, and cuts off his expectancy. The will operates in its inception as a conveyance *in præsenti,* to take effect *in futuro.*

This inchoate title of the heir, created by the very acquisition of the fee by the ancestor, was the reason of the incapacity to dispose thereof before the acquisition; for if the disposition of the property before it was acquired could avail, there would be a concurrence of two inheritable titles, *viz.* that of the heir appointed by the party, and that of the heir appointed by the law; since, after the disposition the disposing party would still, of necessity, take the estate by the conveyance to himself and his heirs.

Lord Holt in Bunker *v.* Cooke observed, that a will was a disposition from the time of making it; and this he considered to be Lord Coke's opinion in Butler and Baker's case. (*c*) Thus too in Arthur *v.* Bokenham, in the Common Pleas, Lord Chief Justice Trevor held that the making of the will is the foundation, and an incipient disposition; so that if the devisor have not the land at the time, it will not pass.

In the case of Harwood *v.* Goodright (*d*) Lord Mans-

(*c*) 3 Rep. 31. (*d*) Cowp. 90.

field adopts, and further illustrates the same doctrine. "Though as to the personal estate," said his Lordship, "the law of England has adopted the rules of the Roman testament, yet a devise of lands in England is considered in a different light from a Roman will; for a will in the civil law was an institution of the heir, but a devise in England is an appointment of particular lands to a particular devisee, and is considered as being in the nature of a conveyance by way of appointment; upon which principle it is that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the statute of Henry the Eighth, which says, that—any person *having* lands, &c. may devise, for the same rule held before the statute where lands were devisable by custom."

"These decisions," said the late Lord Chancellor Loughborough, "result from fair legal, that is, fair systematical reasoning, and do not depend upon any captious nicety. The objections to them arise from considering the disposition of land by testament, in the same view as the Roman testament was considered, or wills of personal estate, which is not a just manner of considering what the law of England permits to be a disposition of land by will. It is not an indefinite disposition of all a man may be possessed of at his death, as is the case with bequests of personal property. (2)

A disposition of land by will is no more than an appointment of the person who shall take the specific land at the death of the person making it. It is so far testamentary that it is fluctuating, ambulatory, and does not take effect until after the death: but it is in the nature of a conveyance, as being an appointment of the specific estate. (3) And therefore that course of

(2) In the case of Nancock *v.* Horton, 7 Ves. Jun. 399, it seemed to be the opinion of the present Chancellor that a specific devise of personal estate, of which the testator was never possessed, might operate as a direction to the executor to purchase.

(3) Every gift of land, even a general residuary devise, is specific, (7 Ves. Jun. 147.) because a man can devise only what he has at the

determinations, which, with some attempts to break in upon it, has been established, and fully established, by Bunker *v.* Cooke and Arthur *v.* Bokenham, has been wisely determined; and not determined upon the literal construction of the statute of Wills, but upon the nature of the instrument." (*e*)

Same doctrine applies to copyholds.

The rule is the same in respect to copyholds purchased by a testator after making his will: they will not pass by the general words of the antecedent will, unless indeed, after they are so purchased, they are surrendered to the uses already declared by the last will and testament, as was done in Heylin *v.* Heylin, (*f*) where the will was held to be republished by the words of the surrender; and the will being a devise of all the testator's copyholds, the same when republished would apply to those which had been subsequently purchased. But in Warde *v.* Warde, (*g*) where the testator, Thomas Warde, by his will *reciting that he was seised of a*

(*e*) Brydges *v.* Chandos, 2 Ves. Jun. 427.

(*f*) Cowp. 130., and see Spring on dem. Titcher *v.* Biles, 1 T. R. 435, n. (*f*), and 8 Ves. Jun. 286.

(*g*) Ambl. 299.

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time of devising, Ib. 399.; and see the case of Hill *v.* Cork, 1 Ves. and Beam. 175. A very material distinction as to the force of the residuary clause in respect of personal and real estate results from this doctrine of considering a will of land, as to its immediate effect, as a species of inchoate conveyance by way of appointment, *viz.* if a legacy of personalty lapses, the subject passes with the residue to the residuary legatee; but if a devise of real estate, which is always specific, lapses, it goes to the heir, and not to the residuary devisee. Still, however, it seems that if *at the time of the devise* the person intended is not in existence, the subject of the devise, though real, will go to the residuary devisee. Doe on dem. Stewart, *v.* Sheffield, 13 East. 526. 1 Ves. 48. 8 Ves. Jun. 25.

In favour of a surrenderee the admittance, it is true, has relation to the surrender, so as to make the estate pass in the same course of descent, and so as to give the same right of dower and custom which would have attached had the admittance followed immediately upon the surrender, because those are acts of law which are helped by relation. But relations and other fictions of law will not make good the acts of parties. 3 Rep. 29 a.

copyhold estate (when the fact was not so,) devised all his real estate, &c. and afterwards purchased a copyhold, and surrendered it thus, *viz.* "to such uses as I by my last will shall appoint:" the will was held not to operate upon this property. And in the above case of Heylin *v.* Heylin, Lord Mansfield stated the distinction clearly, as follows:—"If one devises lands by the name of B., C., and D., and purchases new lands and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands B., C., and D. But if he says I give *all* my real estate, a republication will affect such newly purchased lands. It has also been determined that in all cases a surrender to the use of a will, to be availing, must be made while the person so surrendering has the legal property. (*h*) So that if the surrenderee of a copyhold before his admittance surrendered to the use of his will, and was afterwards admitted, such surrender was of no effect, and was not made good by the subsequent admittance.

The doctrine was thus established to the extent of the proposition that a surrenderee is incapable of surrendering to the use of another, or even to the use of his own will, before admittance, and that no subsequent admittance will make his surrender valid.

But although it is true that the surrenderee takes no estate at law before admittance, being a mere nominee or appointee, and not a *cestui que use,* the surrenderor still remaining tenant to the lord; yet the surrenderor is considered as a trustee for the surrenderee, immediately upon the surrender, (*i*) so that he (the surrenderee) has an equity or equitable estate or interest which may be the subject of a devise or assignment. Thus, if a surrender be made, though out of court, to the use of A., and then A. devise the land to B., and die before any admittance, yet the

(*h*) Doe on dem. Tofield *v.* Tofield, 11 East, 246.
(*i*) 1 Durnf. & East, 601, 602.

copyhold so surrendered will pass, as the testator had a title in equity. (*k*) And if a copyholder having such equity only, devise the land, and after such devise the legal estate come to him by descent, and then he die, the equity will, it seems, be bound; for such would certainly have been the case had the legal estate not so descended to him: and with respect to freeholds, it has been well settled that the accession of the legal estate would be no revocation of the will, but would be subject to the disposition of the equity. (*l*) But it is said that an heir cannot devise without admittance, for he has more than an equity. (*m*)

These questions, indeed, have at this day little direct importance, dispositions by will of copyhold estates being now effectual without a previous surrender to the uses thereof, by virtue of a late statute: but we have treated of the above points independently of that statute, (*n*) for the better illustration of the principle upon which they turn.

The Courts have put a liberal construction on the nature and extent of the interest of which a testator must be possessed to qualify him to devise his estate. Modern decisions have extended the power of testamentary disposition to contingent and executory interests, where the person who is to take is certain, and where the same would descend if not devised. Lord Kenyon held that the word '*having*' in the statute was to be understood to mean '*having an interest;*' and distinguished between such a contingent interest and a mere possibility, or a mere expectation of succession, as that of an heir from his ancestor. (*o*)

A right of entry not devisable.

But if a man devise land, and be afterwards disseised, and then die, the devise is void, and cannot be made good, because the disseisin has turned the estate to a

(*k*) 3 Cha. Rep. 4. 2 Freem. 157. 1 Ves. Jun. 254.

(*l*) Davy *v.* Beversham, 3 Cha. Rep. 4., and see 1 T. R. 601. S. C. cited.

(*m*) 1 Str. 487. 1 Atk. 386. (*n*) 55 Geo. 3. c. 192.

(*o*) 1 H. Bl. 30. 3 T. R. 88. Fearne's Cont. Rem. 463, *et seq.*

right, which is only a chose in action, and cannot be devised away; (*p*) therefore, says the book, it was held a good plea against the devise that the devisor did not die seised of those lands. The interest must continue in the testator till his death for the will to have its consummation; and accordingly it was observed by the present Lord Chancellor in the important case of The Attorney General *v.* Vigor and Others, that "in order that an estate should pass by a will the testator must have the estate when he devises, and must continue to have the same estate at his death."(*q*) But if in such a case the devisor re-enter and purge the disseisin, he is by relation restored so as to be in the same situation as if he had never been disturbed, and the devise becomes good. (*r*)

The case is different where a man is first disseised and then devises, and afterwards re-enters; and it may be reasonably disputed whether in such a case, when the disseisin was before the making of the will, such re-entry afterwards would make the estate pass by the will; for in such case the testator would have had nothing but a right of entry at the date of his *will*: and it is well established that the testator must have the estate both at the date of his will and at his death. From what fell from the present Chancellor in The Attorney-General *v.* Vigor and Others, (*s*) it appears to have been his Lordship's opinion that the difference between the two cases above supposed varied the operation of the subsequent entry. "If he is disseised," said his Lordship, "before the execution of his will, his will would not pass the land, for he was not seised at the date of the will, having only a right of entry. But if he has the land at the date of the will, and is disseised afterwards, the act not being an act of volition, and afterwards he enters, he is remitted

(*p*) Bro. tit. Dev. pl. 15.

(*q*) 8 Ves. Jun. 282.; and see 11 Mod. 128., and 1 Bos. & Pull. 602, by Eyre, C. J.

(*r*) 38 Hen. 6. c. 27.

(*s*) 8 Ves. Jun. 282.

to his old title; and if he dies afterwards, you may predicate of him, that he had the estate at the date of the will, and had the same estate at his death. Suppose there was a republication of the will after the disseisin and before re-entry, that republication would not pass the estate; for the same reason that if at the date of the will he had nothing but a right of entry, the will would not pass it. (1)

Equitable interests.

With respect to this necessity for the testator's having the estate or interest at the time of his making his will, the rule of equity corresponds with the law. In equity the mortgagee's estate is the security; the equity of redemption in the mortgagor is virtually the land itself: therefore, if the equity of redemption is purchased in, or foreclosed by the mortgagee after making his will, it will not pass thereby, being regarded in courts of equity as a new acquisition made after the will. (*t*) But where a real estate is contracted to be

Equity of redemption.

Title by contract.

(*t*) Strode *v.* Falkland, 3 Cha. Rep. 99.

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(1) See the case of Goodright *v.* Forrester, 8 East. 552. The fine of a tenant for life displaces and divests the estate of the remainder-man or reversioner, leaving in him only a right of entry to be exercised either immediately for the forfeiture, or within five years after the natural determination of the preceding estate: and the effect of the statute 4 Hen. 7. is only to save to all the remainder-men their respective rights of entry within five years after their respective titles successively accrue, without being prejudiced the one by the other's laches. *But such right of entry is not devisable*, though it may be released. Shep. Touch. 225. Litt. s. 347. Co. Litt. 48 b. 214 a. 266 a. Perk. s. 86. edit. 1642. That the fine divests the remainder, see Litt. s. 416: and Fowes *v.* Salisbury, Hard. 401, 402. It is also clearly held that although the remainder-man is at liberty to enter presently for the forfeiture, still he has a future right of entry unaffected by that present right, which may be exercised within five years after the determination of the antecedent interest by the death of the tenant for life. The Court thought in the case of Goodright *v.* Forrester, that such right of entry did not come within the description of the word *interest* in the 34 & 35 Hen. 8. and that the remainder-man could not be considered as having an interest in the thing at the time of his devise; for an executory interest was very different from a right of entry for revesting a divested estate.

purchased, courts of equity consider the estate as in the purchaser, from the execution of the contract; and, as a consequence of this maxim, a will disposing of the estate before the contract receives its fulfilment by the conveyance, is effectual to pass the interest; and it follows of course that such will is not revoked by a subsequent conveyance either to the purchaser and his heirs, or to a trustee for the purchaser and his heirs. So where the personal estate is impressed with the character of real estate by being agreed to be sold, and the money to be laid out in land to be settled, the person to take the absolute reversion under such settlement may devise it by his will; and the estate, though purchased after the will, will go in equity according to such devise. (*u*) And it will be the same although such equitable interest arises upon an agreement which is not to be carried into execution till a future day;—the interest in this executory estate will pass by the will. (*x*) And an interest so resting in contract equitably concluded and binding, will pass under words of general description, as where a man having entered into a contract for the purchase of an estate, after some particular devises gave "all his messuages, lands, tenements, and hereditaments in the county of B., or elsewhere in any part of England;" and the question being whether the lands so contracted for were disposed of by the general words above quoted:—it was determined that such words were sufficient to carry any estate of which the testator was possessed at the time of his devise whether in law or in equity. (*y*) But it is obvious upon the principles, on which a good deal of remark has already been made, that the will cannot affect a subject in which no equitable interest has been acquired by the execution of the articles of purchase. (*z*)

Personal estate impressed with the character of real estate.

Equitable interests will pass under words of general description.

To prove that a devise of land was a present dis-

(*u*) 8 Ves. Jun. 256.
(*x*) Greenhill *v.* Greenhill, Prec. Cha. 320. 2 P. Wms. 631.
(*y*) Potter *v.* Potter, 1 Ves. 437, 494.
(*z*) Langford *v.* Pitt, 2 P. Wms. 629.

position to take effect *in futuro,* Lord Holt in the above-mentioned case of Bunker *v.* Cooke instanced a case in Lord Bridgman's time, wherein, there having been a devise to two persons and their heirs, and one of them dying in the testator's lifetime, it was held that the survivor should take the whole: the true reason being that the devise is sufficient to pass the whole interest, and imports a gift in virtue of which each derives, or rather is intended to derive an entire interest, and to become seised *per my et per tout.* (*a*)

Incapacity of jointenants.

A jointenant is in a state of incapacity to devise his estate; not having, at the time of making his devise, an interest on which it can attach, or to which it can apply as the subject of a present disposition; and the inceptive incomplete disposition by will not having power to sever the jointure. No devise can take effect till after the death of the devisor, and by the death of a jointenant all the land becomes instantly vested in the survivor. The right of survivorship and operation of the will commence at the same moment of time: but the *jus accrescendi præfertur ultimæ voluntati;* for as Littleton (*b*) puts the distinction, the surviving jointenant claims *by* the death, and the devisee *after* the death;—the claim of the one is in the *per,* and of the other in the *post.* Tenants in common and in coparcenary are empowered to devise by the statute of Wills, which makes no mention of jointenants; and seems to exclude them from the power, as well by the negative implication arising from the express power given to the said other partial owners, as by the general restriction of the power to persons solely seised. Nor, if such devisor survive his companion will his disposition be thereby rendered availing, though he be solely seised at the time of his death; for he had no devisable interest at the inception of the will, (*c*) and the devise cannot be made good by matter *ex post facto.*

(*a*) See Page *v.* Page, 2 P. Wms. 489. Man *v.* Man, 2 Str. 905.
(*b*) Litt. s. 287. Co. Litt. 185.
(*c*) Swift d. Neale *v.* Roberts, 1 Bl. Rep. 476. S. C. 3 Burr. 1488.

SECT. II.

The Capacity of taking.

BEFORE the statutes of Wills lands were incapable of being devised, except under favour of some local custom. Where such custom prevailed, as it was annexed to the land itself and not to the person, it seemed to comprehend the power of disposition in mortmain. The question of ability to devise in mortmain could not be raised in other cases, as the general power of devising did not exist till it came in by the statute of Wills: how it was restrained in respect to corporations will be presently shewn.

Statutes of mortmain.

A gift in mortmain was a phrase signifying a donation of lands or tenements to corporations, sole or aggregate; and implying that by such a gift as well the fruits of tenure due for such property to the lord of the fee, as the services due out of such fees for the defence of the realm, became extinguished and lost, and the lands were as unproductive as if they were in the hands of a dead man. By Magna Charta it was therefore provided, that "it should not be lawful for any one to give his lands to any religious house, and to take the same again to hold of the same house; nor should it be lawful to any house of religion to take the lands of any, and to lease the same to him from whom they received it. And if any from thenceforth should give his lands to any religious house, and thereupon be convict, the gift should be utterly void, and the land should accrue to the lord of the fee."

A great many subsequent statutes became necessary to defeat the devices of the ecclesiastics, (in those early times the persons most learned in the law,) who thereby sought to elude restraints which went in a great measure to cut up the sources of their wealth and accumulations. Thus the statute *De Religiosis*, 7 Edw. I.

st. 2. after reciting the prevailing artifices whereby the former prohibition had been evaded, ordained that "no person, religious or other, whatsoever he be, should buy or sell any lands or tenements under the colour of gift or lease, or receive by reason of any other title, whatsoever it be, or by any other craft or engine, lands or tenements, under pain of forfeiture of the same." But this statute being held to extend only to gifts, alienations, and other conveyances, the ecclesiastics evaded it by pretending title to the land which they were desirous of obtaining, and so recovering it in an action, by collusion with the tenant. (*d*) By the 13 Edw. 1. c. 32. they were precluded from acquiring lands by purchase, gift, lease, or *recovery*; whereupon they resorted to the method of causing the lands to be conveyed to other persons and their heirs, to the use of them and their successors; which answered for some time, till by the statute of Rich. 2. c. 5. this was also enacted to be mortmain, and within the forfeiture of the statute *De Religiosis*. But as the statute of Richard was held only to extend to *corporations*, the statute 23 H. 8. c. 10. carried the prohibition to parish churches, chapels, guilds, fraternities, commonalties, companies, or brotherhoods, without corporation. (1)

But it still continued to be held (*e*) that lands might be given to any *persons* and their heirs, for the finding of a preacher, maintenance of a school, relief of

(*d*) 2 Inst. 75. (*e*) 1 Rep. 26.

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(1) Grants in mortmain by these express prohibitory statutes were not made void so as to let in the heirs at law; but a title by forfeiture was given to the King or the mesne lords. The statute of Wills, 32 Hen. 8. c. 1. gave a general power of devising: but the explanatory act, 34 Hen. 8. c. 5. excepted corporations; so that devises to corporations under the operation of these acts became void, and incapable of being legalized by *licence*; by consequence the *heir* was let in from the passing of the stat. of 34 Hen. 8. c. 5. to the 43 Eliz. c. 4., except where there happened to be a custom for devising in mortmain. See the Year Book, 45 Edw. 3. c. 26.

maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging the poor inhabitants of a town of common charges, for the making of a stock for poor labourers in husbandry and poor apprentices, and for the marriage of poor virgins, or for any other *charitable uses*. And it was further held, that by obtaining proper licences from those who would be entitled to the forfeiture, alienations in *mortmain* might still be made, as appears from the preamble of the stat. *De Religiosis*. (*f*) The kings of England for the most part grounded their pretensions to this power of licensing on the right, asserted by them to be inherent in the Crown, to dispense with acts of parliament: which dispensing power was found to produce such dangerous consequences in the exercise thereof by James II. that in the first year of the reign of William it was enacted, that no dispensation by *non obstante* to any statute should be allowed, but that the same should be held void and of none effect, except a dispensation be allowed in such statute. (*g*) But by the subsequent statute 7 & 8 W. 3. c. 37. power to licence in mortmain was expressly given to the Crown; and the 2 & 3 Anne, c. 11. enabled any person, by deed enrolled, to give to the corporation for augmenting the maintenance of the poorer clergy, lands or goods, without licence.

By the 43 Eliz. c. 14. special provision was made by commissioners, to be named by the Lord Chancellor or Chancellor of the duchy of Lancaster, within the county palatine, to enquire by the oaths of twelve men into all charitable gifts and appointments, and the management and application of them, and to make orders and decrees concerning their administration: and the words of the same statute were construed to supply all defects of assurances in favour of charities, where the donor was of a capacity to dispose, and had an estate in any way

(*f*) 2 Inst. 74. and see the statutes 18 Edw. 3. st. 3. c. 3. 17 Car. 2. c. 3.

(*g*) 4 Hawk. P. C. 348. Harg. Co. Litt. 120, n.

disposable by him: as if a copyholder disposed of copyhold lands to a charitable use, without surrender, or tenant in tail conveyed without fine, or a reversion was granted without attornment, all such-like defects were supplied by this construction of the said statute, and all such acts of conveyance or assurance were considered as effectual by way of appointment. (2)

Charitable gifts;—favour shewn to them.

The Court of Chancery will relieve by original bill upon a gift to charitable uses within the statute; and, proceeding on the principle of the statute, has shewn great favour to charitable donations. Thus, a legacy given *generally* to a *public charity* has been considered as sufficiently certain, and the executors have received the directions of the Court as to the disposal of it. (*h*) Where there was a bequest of the interest of bank annuities to the poor inhabitants of St. Leonard, Shoreditch, Sir Thomas Clarke, M. R. held that the legacy was not to be treated as void for uncertainty, but should be supported: and that though the word '*inhabitant*' bore a very general sense, yet as it could not be intended that the poor inhabitants who were relieved by the parish should have the benefit of the legacy, which in effect would be giving to the rich and not to the poor, the distribution should be confined to the poor inhabitants of St. Leonard, Shoreditch, not receiving alms; and ordered a scheme to be laid before the Master for such distribution. (*i*) In another case B. gave the surplus of his estate to the *poor*, indefinitely; and upon a question how this bequest could be effectuated, it was decreed that the surplus should go, by the king's

(*h*) Widmore *v.* The Governors of Queen Anne's Bounty, 1 Bro. C. C. 13.; and see Baylis *v.* Attorney General, 2 Atk. 239.

(*i*) Attorney-General *v.* Clarke, Ambl. 422.

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(2) That devises to corporations were under that statute considered good by way of appointment, see Hob. 136. Moor, 888. 1 Lev. 284. But note that the words 'limit and appoint' in the statute did not carry the legal estate, but operated only as a gift of the *utile dominium*, to bind the legal estate in the hands of the heir.

directions, to the benefit of the children in the new royal college of Christ's Hospital. (*k*) So where a sum of money was bequeathed to be distributed every year, on certain days, to the poor of the parish of L., in the county of M., in which county there was no such parish, but there was such in the county of D.: the Court established the will, because it appeared that the testator was born there, and that both he and his parents lived and died there. (*l*) And where a charge of 1000*l*. on a manor was to be applied to such charitable uses as the testator had by writing under his hand directed, equity supported the bequest, though no such writing was found. (*m*) Again, where there was a gift of the residue of personal estate to J. B., to dispose of it in such charities as he thought fit; though J. B. died in the lifetime of the testatrix, and the testatrix made no alteration in the disposition after she had knowledge of such death, the devise was carried into effect. (*n*) Thus also, in another case, a devise to charitable uses, declaring no use, was supported. (*o*) Even where the charity has been against the policy of law, the same doctrine has prevailed; as where it was to establish a jesuba to teach the Jewish religion; (*p*) or to educate poor children in the Roman Catholic faith. (*q*) And where a charity has been so given as that there can be no objects of it, the Court has entertained proposals for a different scheme. (*r*) Thus, a trust having been created for the propagation of the Christian religion among the natives of New England, and there being no infidels to convert within the intended limits, and the colleges which were appointed to administer the

(*k*) Jones *v.* Peacock, Finch, 245.

(*l*) Owen *v.* Bean, Finch, 395.

(*m*) Attorney-General *v.* Syderfin, 1 Vern. 224.

(*n*) Moggridge *v.* Thackwell, 3 Bro. C. C. 517. 1 Ves. Jun. 465, 474. 7 Ves. Jun. 36, 67.

(*o*) Attorney-General *v.* Herrick, Ambl. 712.

(*p*) Ambl. 228. Da Costa *v.* De Pas, Reg. lib. A. 1754., fol. 309.

(*q*) Cary *v.* Abbot, 7 Ves. Jun. 490.

(*r*) Attorney-General *v.* Oglander, 3 Bro. C. C. 166.

charity having become subject to a foreign power, the Master was directed to propose a plan *de novo* for the application of the produce of the estates according to the general intentions of the testator. (*s*) So if a fund were bequeathed to augment the scholarships or fellowships of a college for the benefit of the youth educated at a particular school, and the college should refuse the intended endowment, and decline increasing the number of its fellows; yet, if another college would accept the gift upon the terms proposed, or another plan for effectuating the general intention could be proposed, it seems that the charity would be supported and effectuated in substance notwithstanding the purpose must circumstantially fail from unforeseen and contingent events. (*t*) And although, in general cases, where there is a devise to take effect at a remote period upon a contingency, and no intermediate disposition of the rents and profits, they are considered in equity as resulting to the heir; (*u*) yet if lands be given to a charitable or good use, though not capable of taking effect immediately, as to found a college, (the charter and licence of the Crown being necessary and not yet obtained,) the intermediate rents between the death of the testator and the period of founding the college will not belong to the heir as a resulting trust, but will be considered as belonging to the college. (*x*) Upon the same principle of favour, where a residue of personalty is left to charitable uses, which proves to be more than sufficient for the object, if it appear to be the testator's intention to dispose of the whole surplus that way, the remainder will be applied to similar purposes. (*y*)

(*s*) Attorney-General *v.* The City of London, 3 Bro. C. C. 171.

(*t*) Attorney-General *v.* Andrew, 3 Ves. Jun. 633.

(*u*) Hopkins *v.* Hopkins, For. 44.

(*x*) Attorney-General *v.* Bowyer, 3 Ves. Jun. 714.; and see Porter's case, and the case of Sutton's Hospital, 1 Rep. 16. 10 Rep. 1.

(*y*) Attorney General *v.* The Earl of Winchelsea, 3 Bro. C. C. 373.; and see 7 Ves. Jun. 324. Bishop of Hereford *v.* Adams, 11 Ves. Jun. 367. Attorney-General *v.* Whitely, Digest xxxiii. tit. 2. *De Usu et Usufructu Legatorum.*

The Court is also very indulgent to charity cases in matters of form. Thus where the information prays a wrong relief, the Court will give such relief as will effectuate justice, (*z*) and holds out its assistance to charities under circumstances in which it would not give relief in ordinary cases, (*a*) often giving the relators costs beyond the taxed costs. (*b*) It has also been decided that where, before the statute of Geo. 2. called the Mortmain act, a testator devised the whole profits of an estate to a charity, if the rents at any time after the statute should be increased, they should go to the increase of the charity. (*c*)

Limitations and distinctions to which the relief is restricted.

But in a case (*d*) where money was given to build a church where a chapel stood, and the Bishop dissented, the same favouring maxims which seem to have prevailed in many other cases where the precise object of the charitable gift has failed from supervening circumstances, were not adopted by Sir Lloyd Kenyon, M. R. who refused to apply the money towards repairing, or otherwise for collaterally effectuating the testator's bounty; saying, that the intention must be implicitly followed, or nothing could be done. In a case (*e*) before Lord Hardwicke, that great Chancellor observed, that though he had endeavoured to give effect to charitable legacies as far as he could, yet he could not set up new rules to avoid the statute of Mortmain; and his

(*z*) 1 Ves. 12, 43, 413. 11 Ves. Jun. 247.

(*a*) 11 Ves. Jun. 367. And as to the extent and comprehension of the term 'charity' in a proper legal sense, and what description of objects are brought within the same indulgence, see 10 Ves. Jun. 522. Morice *v.* Bishop of Durham, and the case of Downing College, in Wilmot's Opinions and Judgments. See also Duke, ch. 10. s. 2. for the adjudged cases on the great enabling statute, 43 Eliz. c. 4. wherein the writer expounds what is a good charitable use within that statute. See also Poph. 139.

(*b*) 7 Ves. Jun. 425.

(*c*) Attorney-General *v.* Johnson, Ambl. 190. Same *v.* Sparkes, *ib.* 201. And see 7 Ves. Jun. 340.

(*d*) 1 Bro. C. C. 444. 2 Bro. C. C. 428.

(*e*) Mogg *v.* The President of Bath Hospital; 2 Ves. 52. Attorney-General *v.* Tyndall.

Lordship refused to marshal assets in favour of a charity; or, in other words, to throw the debts and legacies on the real estate in order that the personal estate might be applied to the charitable use, and so the statute might be avoided. And though in one case (*f*) where a testator willed the residue of his personal estate, consisting of his effects, annuities, *mortgages*, bonds, and notes to be sold, and the produce given to a charity, the devise of the mortgages being void, the Court ordered them, as being part of the residue only, to be first applied in payment of debts, so as to leave a larger fund for the payment of the charity; yet Sir Lloyd Kenyon in a subsequent case (*g*) declared he could not recognize the distinction between a specific gift of a mortgage and the gift of a residue in which it is comprised. In both cases it was an interest in land, which could not pass by the statute, but must go in favour of the parties legally entitled to the benefit of it. And he ordered the debts, legacies, and costs of the suit to be paid out of the testator's general personal estate, and out of the monies secured by mortgage, *pro ratâ*, and the residue of the mortgages to go to the next of kin.

Relief on the principle of *cy pres*.

But when a testator or donor creates a trust for a charitable purpose, and such purpose cannot be literally and circumstantially executed, and especially where the impossibility arises from the neglect or misconduct of the trustees, the Court of Chancery will give effect to the general charitable intention by directing it to be executed *cy pres*, or in a manner as near as may be to the prevailing and substantial wishes of the giver, the same to be collected from the instrument of donation; which principle, with its proper qualifications, is very distinctly set forth in the two following cases. B., (*h*) in 1653, conveyed a messuage lately erected by him for the habitation of the vicar of Poles-

(*f*) Attorney-General *v.* Caldwell, Ambl. 635.
(*g*) Attorney-General *v.* The Earl of Winchelsea, 3 Bro. C.C. 373.
(*h*) Attorney-General *v.* Boultbee, 2 Ves. Jun. 380.

worth, then in the possession of Richard Bell, minister of Polesworth, and several other premises, and the impropriate tithes of Wharton, Dorden, and Pooley, and a rent-charge to certain persons named, to hold to them in fee upon trust to permit B. and his assigns, during his life, to take the rents, and after his death that they or the major part of them, or such other persons or the major part of them, who for the time being should have the freehold and inheritance of the said messuage, &c. should permit the vicar of Polesworth for ever, if he should be there settled by the nomination and appointment of B. in his life, or of the trustees or the major part of them, or such other persons who for the time being should have the freehold and inheritance, and no other, to dwell in the said messuage so erected and intended for such minister's habitation, and to enjoy the same without interruption; and upon other trusts for charitable purposes. For many years the trustees from time to time named some fit person to the Lord Chancellor, the presentation being in the Crown, who appointed to the living according to such nomination: but upon the 7th of December, 1779, the vicar of Polesworth being very old, the trustees by memorial to the Lord Chancellor, represented the age of the incumbent, and requested that upon a vacancy his Lordship would appoint a clergyman recommended by them. Upon the 20th of October, 1787, the incumbent died, and on the 27th he was buried. Between his death and burial one of the trustees waited upon the Chancellor; and, not having an opportunity of seeing his Lordship, left a letter, informing him of the death of the incumbent, and requesting him to wait a short time for the recommendation of the trustees. No further step being taken for two months, the Chancellor without recommendation issued a fiat for the presentation of W. R. Norton, who was instituted on the 17th of January, 1788, and inducted a few days after. The trustees refusing to admit this vicar to the benefits of

the trust, the information was filed at the relation of the vicar.

The great question of fact in this case was, whether any negligence or misconduct was imputable to the trustees; for it was out of dispute that the Chancellor was competent to reject the recommendation of the trustees, and that if he had refused the person named to him in due time, and presented a vicar in opposition to the wishes of the trustees, such vicar could not have been let in to the enjoyment of the benefits of the trust without a direct violation of the donor's intentions. The Court thought the trustees had been guilty of negligence in waiting so long without naming to the Chancellor the object of their choice; and that it would be strange to say that the trustees might wait and make the recommendation whenever they pleased. Upon this state of the facts the Court decided that the relator was entitled to the house intended for the habitation of the minister, the tithes, &c. and directed an account of the rents and profits. "As to the doctrine of *cy pres* as applied to charities," said the Master of the Rolls, "*this sensible* distinction has prevailed:—the Court will not decree execution of a trust of a charity in a manner different from that intended, except so far as they see that the intention cannot be executed literally; but that another mode may be adopted consistent with his general intention, so as to execute it in substance. If the mode becomes by subsequent circumstances impossible, the general object is not to be defeated if it can be attained. In the Attorney-General *v.* The Bishop of Oxford the purpose was to build a church in the parish of A.; and the parish would not let the church be built. Lord Kenyon very properly said it could not be built anywhere else, and the intention must totally fail. But the Court has said, where the general intention may be executed, it shall be so. B. had two objects:—the first was a general charitable object, and very proper; an anxious desire to provide what he thought a competent maintenance for the vicar. There was also another

object: the question is, whether that was equally important, and was so annexed to the first that they must stand or fall together. It was to secure to himself or his trustees the recommendation or approbation at least of the person nominated. If both these purposes can be effected, they ought: but did he mean the first object to fail, if, from the obstinacy or neglect of the trustees, the second could not take effect.—The Court will not permit the general intention to fail for want of circumstances annexed, which by the fault or neglect of the parties cannot take effect.—The general object was that there should be a good minister; and there was a secondary intention that he should come in with the approbation of the trustees."

A case (*i*) was afterwards decided by the same judge which determines with great precision the just extent of the principle of relief, illustrated by the preceding case. B. devised four tenements to the churchwardens and vestrymen of the parish of St. Martin's, Sarum, "in trust for them to give to such poor men of that parish as they shall think fit. And as I intend these four houses to be in the manner and custom of almshouses for men and their wives, I give and bequeath to the churchwardens and vestrymen of this parish the sum of 2000*l.* in the 4 per cents., in special trust for them to dispose of the interest in the following manner, *viz.* my will is for them to give or allow to each of the four persons whom they are to permit to inhabit the four houses, the sum of thirteen pounds per annum, or five shillings a week." The testator then gave the remainder of the interest to other charitable purposes, to which there was no objection. He appointed executors, but made no disposal of the residue. The information prayed that the bequest of the residue might be established, and the fund transferred to the relators, might be appropriated according to the intention of the testator, or as nearly thereto as the circumstances

(*i*) Attorney-General *v.* Whitchurch, 3 Ves. Jun. 141.

might admit, or otherwise, that it might be declared to what extent the bequest was good. "Upon this charitable bequest," said the Master of the Rolls, "it has been contended that although it must be admitted that the gift of the four tenements is void by the statute of Mortmain, yet the other part, as far as it concerns the 2000*l.* stock appropriated for the maintenance of the poor men and women, may be supported, as not being essentially connected with or belonging to it, but as denoting a general intention; which, though the rest fails, may remain and be fulfilled. With regard to the principles upon which this Court has administered charities, where the same cannot be carried literally into effect, I refer and adhere to those principles which I laid down as the rule by which I conceive this Court ought to govern itself, in the Attorney-General *v.* Boultbee. (*k*) A charitable bequest cannot be defeated by the negligence or default of the person to administer it, or by the impossibility of giving effect to every circumstance. If the general intention appears consistent with the rules of law, and not against the mortmain act, it shall be carried into effect without regard to the secondary objects which the testator might have intended. The doctrine of *cy pres*, however wildly and extravagantly it has been acted upon in former cases, is, by late decisions, particularly since the statute, administered in this way. The Court will not administer a charity in a different manner from that pointed out, unless they see that though it cannot be literally executed, another mode may be adopted by which it may be carried into effect in substance, without infringing upon the rules of law." His Honour next declared his concurrence with the opinion of Lord Northington that the Court ought not to study to evade the statute; and, after questioning the propriety of Lord Hardwicke's opinion as intimated in the Attorney-General *v.* Bowles, that where the testator's object was to erect a building

(*k*) *Vide supra.*

upon land not then given, if land should be afterwards given, the statute would not be evaded by applying the money to erect a building upon it, which he considered as giving land in mortmain, being only another mode of purchase, and holding out a temptation to people to give land in mortmain, proceeded thus:—"It remains to apply these principles to see whether there be any intention to give this fund to the general purpose of providing for poor men and women, independently of the almshouse; or whether an endowment only is proposed by the appropriation of part of the interest to that object. In that view it must be admitted that it must fail, according to the Attorney-General *v.* Goulding.(*l*) It is extremely material that the principles of the cases upon charities should be fixed and determined. It is said that an intention to give this provision to any poor men and women may be collected. If I could collect that intention, I would execute it: but I cannot. It is not enough to say that it is not inconsistent with that intention; or, that if the testator could have foreseen the failure of that object, he would have given it to poor men and women without regard to the houses. Perhaps he would;—but can I judicially pronounce that he would? Or, for such is the office of a judge, can I fairly infer that he would, upon this will? I cannot. I cannot create another charitable object for him, or apply this to any different object, so as to be warranted in saying I fulfil the intention. I am therefore warranted in declaring that under the true construction of this will the intention was to make an endowment of almshouses; that there is no general intention beyond that; and that therefore the bequest, so far as it concerns those alms-

(*l*) 2 Bro. C. C. 428. See also Blandford *v.* Facherell, 4 Bro. C. C. 394.; and particularly the late case of The Attorney-General *v.* Hinxman, 2 Jac. & Walk. 270. According to the cases of Chapman *v.* Brown, 8 Ves. Jun. 404., Attorney-General *v.* Davies, 9 Ves. Jun. 535., the bequest of the residue of a fund after an indefinite gift to purposes defeated by the Mortmain acts, is void from the impossibility of ascertaining what the residue would have been if the prior dispositions had been legal.

houses, must fail, with the object to which it was attached."

It may, therefore, be taken as established, that if a particular charity be the sole and express object of the testator, and the mode appears to be a special part of his purpose, such charity must be effectuated in the manner prescribed, or it must fail altogether. The Court will not deem itself warranted in such a case in applying the fund to any other charitable purpose. (*m*)

When the disposition is by the King's sign manual, and when by the Chancellor.

It appears to be pretty well settled in what cases of indefinite charitable bequests the control and disposition of the fund devolve upon the King, as *parens patriæ*, to appoint the same by his sign manual, and when the Court of Chancery shall have the management, to be settled by a scheme to be recommended by the Master. In Moggridge *v.* Thackwell, (*n*) Lord Chancellor Eldon, after taking a review of the authorities bearing upon the subject, declared himself to think that the run of cases, with the exception of the Attorney-General *v.* Peacock, (*o*) rather imported that where a trust was originally created for the distribution of a charity, as it was not, in a strict sense, a general indefinite gift to charity or to the poor in general, the Court would execute it by a scheme; but that where money was given to a charity, generally and indefinitely, without trustees or objects selected, the King, as *parens patriæ*, was the constitutional trustee, to whom was committed the disposition of the fund by sign manual. In this case of Moggridge *v.* Thackwell the testatrix gave all the rest of her personal estate to James Vaston, desiring him to dispose of it in such charities as he thought fit, recommending poor clergymen with large families and good characters. Vaston died nine years before the testatrix: but the Court considered this a charity with a

(*m*) Attorney-General *v.* Bishop of Oxford, 1 Bro. C. C. 444, n. and see Ambl. 489.

(*n*) 1 Ves. Jun. 465, 474. 7 Ves. Jun. 36.; and see 14 Ves. Jun. 372., 15 Ves. Jun. 234. Mills *v.* Farmer, 1 Meriv. 103.

(*o*) Finch, 245.

trustee originally appointed, and therefore proper to be referred to the Master to settle a plan for giving effect to the general intention of the testator. But where a testator, after several bequests, directed that "any remaining money should be given to a *private* charity," it was held that such a bequest was too indefinite either to be carried into execution by the Court, or to give the Crown a jurisdiction. (*n*)

The statute of Geo. 2. called the Mortmain act.

The statute 9 Geo. 2. c. 36, enacts, "that from June 24, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be made by deed, indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of the execution and death) and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such grantor or donor, (including the days of the transfer and death) and unless the same be made to

(*n*) Ommaney *v.* Butcher, 1 Turn. Rep. 260.; and see Mills *v.* Farmer, 1 Meriv. 103. and James *v.* Allen, 3 Meriv. 17.

take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him." And by the third section all gifts or transfers made in any other manner or form than is directed by this statute, are declared to be void. By the second section gifts or transfers for valuable consideration actually paid, and *bona fide* made, are excepted. The fourth section provides that the act shall not extend to make void the dispensations of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of Eton, Winchester, or Westminster, for the better support and maintenance of the scholars only upon the foundations of the same colleges. But by the succeeding section these colleges are restrained from holding or enjoying more advowsons than shall be equal in number to a moiety of the fellows or persons stiled or reputed as fellows, or where there are no fellows or persons reputed as fellows, to a moiety of the students on the foundation, not computing advowsons given for the better support of the headships of any of the said colleges in the number. (*o*)

Lord Hardwicke's exposition of the purview of the Mortmain act.

In the case before Lord Hardwicke, of The Attorney-General *v.* Weymouth, (*p*) his Lordship stated with great distinctness the purview of the statute. "It is insisted," said his Lordship, "that the true intention of the act was, according to its title, to restrain the disposition of lands, whereby they became unalienable; and that this was the only intention of the act. But I think the intention of the act is taken up much too

(*o*) But the stat. 45 Geo. 3. c. 101. has repealed this restriction.

(*p*) Ambl. 20.; and see the *Collectanea Juridica*, 433.

short; for the title is no part of the act, and has often been determined not to be so, nor ought it to be taken into consideration in the construction of this act; for originally there were no titles to the acts, but only a petition and the King's answer; and the judges thereupon drew up the act into form, and then added the title; and the title does not pass through the same forms as the act itself; but the Speaker, after the act is passed, mentions the title, and puts the question upon it: and therefore the meaning of this act is not to be inferred from the title, but we must consider the act itself. It first takes notice that gifts and alienations of lands in mortmain are prohibited by divers wholesome laws, as prejudicial to the common utility; and then it proceeds, that nevertheless this public mischief has greatly increased, by many large and improvident alienations or dispositions, made by languishing or dying persons, or by other persons, to uses called charitable, to take place after their death, to the disherison of their lawful heirs. The reason of this statute was to hinder gifts by dying persons out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls, to give their lands to charities, which they paid no regard to in their lifetime; and therefore the act of parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed executed a year before the death of the grantor, and enrolled within six months after execution. The Legislature blended the two inconveniences together: the act of languishing and dying persons and the disherison of heirs." (3)

A devise of lands to be sold, and the money to go to a charity, is within this act.

In the above case of the Attorney-General *v.* Lord Weymouth,(*p*) the devise was of land to be sold, and the

(*p*) Ambl. 20.; and see Attorney-General *v.* Harley, 5 Madd. 321.

(3) The statutes of mortmain, and the law as to perpetuities, were sufficient before the statute 43 Eliz. c. 4. to prevent lands from being rendered unalienable. The 43. Eliz. c. 4. revived the power as to charitable uses; and for preventing the abuse of this only method remaining of granting in perpetuity, the statute 9 Geo. 2. c. 36. was enacted.

residue of the money after payment of debts, &c. was to go to a charity. And though such a devise does in contemplation of equity usually convert the real into personal property, yet as the statute had expressly provided not only that lands themselves should not be given to charitable uses, but that they should not be charged or incumbered for such purposes, a devise of lands to be sold and the money to be laid out in charitable uses, was considered as within *both* prohibitions; for here the lands were devised expressly for the ultimate object of a charity, and furthermore these lands were charged for a charitable use. It was to be considered too, that it was a gift of the rents and profits till a sale: and how long such sale might be postponed nobody knew; for no man had a right to compel the trustees to sell, if they paid the debts and legacies, but the charity; so that being a devise of the rents and profits, it was in effect a devise of the lands themselves. And as to the devise of the money arising from the sale, it was not thought necessary to the determination of the question upon the statute, to say whether it should be considered as a devise of the land or of money. If the act were not in the way, the persons entitled to the residue might come and pray to have the land in that Court instead of the money, and might have retained it as land; and as the testator had given them the profits till sale, he had made them owners in equity of the estates. But it was not necessary to rely upon these grounds, since, whether the thing devised were considered as land or money, for the reasons above-mentioned the devise was void.

Mortgages, terms of years, and money secured on tolls or rates, not devisable in mortmain.

Copyholds are included within the operation of the above act, and although a mortgage is considered as personal estate in equity, and a term of years is personal both at law and in equity, yet a devise of such subjects for a charitable use is not good within this statute, the words being, that the *lands* shall not be conveyed or settled *for any estate or interest whatsoever, or any ways charged or incumbered in trust for, or for the benefit of, any charitable use.* Nor is there any distinction in this

respect between a devise of the mortgaged premises and of the money due on mortgage; for the devisee would have the right of making the pledged estate his own by foreclosure, if the money should not be paid. The devise of money due on mortgage is construed to pass the whole interest of the mortgagee, and has been well compared to a devise of the rents and profits of land by which the land itself passes. (*q*) So neither can annuities charged upon land, money secured upon tolls or by assignment of poor rates or county rates, pass under a bequest to a charity, for they all come out of the realty. (*r*) The same doctrine has prevailed in respect to a lease under the Crown of the right to lay mooring chains in the river Thames. (*s*) And a bequest of money with a direction to apply it in paying off a mortgage on certain chapels, has been held void within the same statute. (*t*)

Money given to be laid out in lands, within the words of the act. Exceptions.

Money given to be laid out in lands is within the words of the act: but where a bequest was made to charitable uses to be secured by the purchase of lands of inheritance *or otherwise*, it was determined that such devise was good by force of the words *or otherwise*. (*u*) For if a devise in a will is in the disjunctive, and leave to the executors two methods of doing a particular thing, the one lawful and the other prohibited by law, the Court cannot say, that because one method is unlawful, the other is so too, and that therefore the whole bequest is void. If one be lawful, that *must* be pursued and take effect. And though some stress at the bar was in the last cited case laid upon the words in the will directing the benefit to be *for ever*, yet the Lord Chancellor would not allow any weight to the objection; and he mentioned that there might be annuities not payable

(*q*) Attorney-General *v.* Meyrick, 2 Ves. 44. Attorney-General *v.* Graves, Ambl. 155. Attorney-General *v.* Caldwell, Ambl. 635.; and see Paice *v.* Archbishop of Canterbury, 17 Ves. Jun. 364, 462.

(*r*) Durour *v.* Motteux, 1 Ves. 322. Knapp *v.* Williams, 4 Ves. Jun. 430, n. French *v.* Squire, 10 Ves. Jun. 41.

(*s*) Negus *v.* Coulson, Ambl. 367.

(*t*) Corbyn *v.* French, 4 Ves. Jun. 431.

(*u*) Soresby *v.* Hollins, Aug. 6, 1740. Highm. 75.

out of land which might have probable continuance *in perpetuum*, as Sir Thomas White's charity, which was a disposition of money to be employed in continual rotation in loans of several sums to poor tradesmen for stated periods, and any man might by will give a perpetual charity in this manner at this day. And the words *heirs and assigns* imported no necessity for a purchase of lands; upon which part of the argument his Lordship said he would suppose that an obligor bound himself, his heirs, executors, and administrators, in a sum of money to a Papist, who obtained judgment on the bond and took out an *elegit*, in such case it had been held at the assizes that the Papist could not maintain ejectment, and yet the bond was good to bind the person of the obligor and his representatives, but not to charge his lands, or his heirs who represented him in his landed capacity.

Where money was directed to be invested in the public funds, there to stand in the names of the trustees until it could be laid out in the purchase of lands to the satisfaction of the governors and trustees, which lands were to be purchased in the names of the trustees to certain charitable uses therein mentioned, (*v*) Lord C. Hardwicke, after observing that it was not a clear case, thus proceeded:—"I think it would be a hard construction to say that such a charitable bequest is void by the statute. If a person directs money to be laid out in lands for a charitable use, it would be void. So where a man gives it in such a manner that the land to be purchased is the final end and thing given. But where there is sufficient room for the Court to say there is a discretionary power in the trustees to lay the money out one way or other, either in the funds or in lands, I have determined such a devise to be good, as in Soresby *v.* Hollins, and Grayson *v.* Atkinson. I am of opinion there is room to construe this bequest with this latitude. The direction is to place the money in the funds until laid out in lands to the satisfaction of the trustees. When can that be?

(*v*) Grimmett *v.* Grimmett, Ambl. 210. Collect. Jur. Vol. i. 54.

Not while this statute is in force. Suppose it had been till by law it may be; such bequest would be good. These words must mean when the trustees approve of laying it out; which cannot be while the statute of Mortmain is in force, it would be to act contrary to their trust." (*w*)

The reasoning, however, of Lord Hardwicke, in the last-mentioned case, appears to turn upon an over-curious distinction, and can hardly be taken as affording a principle which the law would recognize at the present day. The decision, indeed, has been adverted to in terms of disapprobation in a subsequent case, (*x*) wherein Ashurst and Eyre, Lords Commissioners, held that a direction to place money at interest until an eligible purchase of land could be made, was within the statute; and they observed that Grimmett *v.* Grimmett turned upon a very nice criticism of the expression.

Where money was bequeathed to the corporation of Queen Anne's bounty, because by the sixteenth rule of that corporation, it is to be placed out in the public funds till such bequest be laid out in proper purchases of *lands*, it was held to be within the act; (*y*) but devises in favour of Queen Anne's Bounty, if duly executed, &c. are now excepted from the operation of the statute by the 43 Geo. 3. c. 107.; and personal property may be given in the donor's lifetime without deed by virtue of the stat. 45 G. 3. c. 84. Devises of a limited quantity of land, if executed three months before the devisor's death, and bequests to the amount of 500*l.*, may, by virtue of the 43 G. 3. c. 108. (if executed as therein is directed) be made for promoting the building of churches and chapels, and of houses for the residence of ministers, and for providing church-yards and glebes. A legacy of money to be laid out in land in Scotland is not within the statute of Geo. 2., and therefore has

(*w*) And see Carte *v.* Hutton, 14 Ves. Jun. 507; see also Kirkbank *v.* Hudson, 7 Price Rep. 212. Doe *v.* Wright, 2 Barn. & Ald. 710. as to the effect of a recommendation to purchase land.

(*x*) Grieves *v.* Case, 4 Bro. C. C. 67.

(*y*) Widmore *v.* Woodroffe, Ambl. 637.

been held good by Lord Thurlow and the present Chancellor. Nor does the act extend to Ireland, or to the West Indies. (*a*)

A bequest for the support or repair of what is already in mortmain, is good.

To support that which at the time of the will was in mortmain, having been originally given before the statute, is held to be a legitimate object of a devise; as where a bequest was made of 200*l.* to repair a free chapel. (*b*)

And where A. bequeathed 400*l.* and 100*l.* to trustees to be laid out in building a parsonage house on the glebe of Bickton, the question being whether these legacies were within the statute of mortmain, Sir T. Clarke, Master of the Rolls, was of opinion that they were neither within the words nor meaning of the statute. The statute was intended to prevent new acquisitions in mortmain. Erecting a building was not to be considered as such. (*c*)

Lord Hardwicke in one case appears to have thought that when a testator gave money to be laid out in the erection of a chapel or school, his legacy would be available notwithstanding the statute, if a piece of ground already in mortmain could by any means be obtained for the purpose. Thus the opinion expressed by him in the case of Vaughan *v.* Farrer, (*d*) was, that a bequest of money for *erecting* a hospital or school was not within the mortmain act; because it did not necessarily follow that any new purchase of land should be made for the purpose, which might have been equally well accomplished by building upon land already in mortmain, or by a gift of land, or by hiring

(*a*) Oliphant *v.* Hendrie, 1 Bro. C. C. 571., Mackintosh *v.* Townsend, 16 Ves. Jun. 330. Campbell *v.* Radnor, 1 Bro. C. C. 271. Attorney-General *v.* Stewart, 2 Meriv. 149.

(*b*) Harris *v.* Barnes, Ambl. 651. Same *v.* Nash, *ib.*

(*c*) Glubb *v.* The Attorney-General, Ambl. 375. See Attorney-General *v.* Bishop of Chester, 1 Bro. C. C. 444.; also Brodie *v.* Duke of Chandos, *ib.* n.; and especially Attorney-General *v.* Parsons, 8 Ves. Jun. 186.

(*d*) 2 Ves. 187.

a house. And in another case (*e*) it was said by the same Chancellor that such a bequest to erect a school was good, if any piece of ground already in mortmain, or as a mere gift from private generosity, could be procured. But in a subsequent case (*f*) where the circumstance of there actually being a piece of land in mortmain in the parish where the charity was to be erected was much insisted upon, Lord Apsley, Chancellor, said that directions in a will to erect a school-house in general imports an intention to purchase; and though it appears that there is a vacant piece of ground in the parish, the will does not point at that piece of ground. It does not say to repair or build a school-house on that piece of ground. And his Lordship dismissed the information.

A bequest to erect imports a purchase.

Other cases have been equally opposed to Vaughan *v.* Farrer, and the Attorney-General *v.* Bowles. And the doctrine seems now to be settled that a bequest *to erect* (*g*) a charitable foundation imports *primâ facie*, that land is to be bought, unless the testator by his will manifests his purpose that it is to be otherwise procured, or expressly adverts to land already in mortmain. (*h*)

In the case of Chapman *v.* Brown, (*i*) where there

(*e*) Attorney-General *v.* Bowles, 2 Ves. Jun. 547.

(*f*) Attorney-General *v.* Hyde, Ambl. 751.

(*g*) Lord Hardwicke seemed to think that to *erect* might be taken as meaning to found, or endow. And where a sum of money was left towards establishing a school, Lord Loughborough thought that though he could not under this disposition direct any part to be laid out in land or building, yet the master might teach in his own house, or in the church: and he ordered a scheme to be laid before one of the masters of the Court, which would not include the application of any part of the dividends to the purchasing or renting of land. Attorney-General *v.* Williams, 4 Bro. C. C. 526. It may be as well to observe in this place that when a personal estate is left to trustees for a charitable use which they can execute without the aid of equity, there is nothing in the statute to restrain them from laying out the money in land. Vaughan *v.* Farrer, 2 Ves. 188.

(*h*) Attorney-General *v.* Parsons, 8 Ves. Jun. 191.; and see 1 Bro. C. C. 444, n. 3 Bro. C. C. 588. *Ib.* 593, Foy *v.* Foy, cited.

(*i*) 6 Ves. Jun. 191.

was a trust for building or purchasing a chapel, where it might appear to the executors to be most wanted, and if any overplus, the benefit was to go to a faithful gospel minister, not exceeding 20*l.* per annum, and if any further surplus, for such charitable uses as the executors should think proper, the whole trust was declared void; for the bequest to purchase was clearly void by the words of the act. The trust to *build* having been also established to be within the act, that bequest therefore fell to the ground. The bequest on behalf of the minister, as being clearly intended for a minister of the chapel so directed to be built, could not stand, as the thing failed with which it was inseparably connected. And, lastly, although standing by itself, a bequest of a residue, to be employed in such charitable purposes as the executors should think proper, was a good bequest; and supposing it had been legal to bestow the money as testatrix had directed in the two first instances, after such purposes had been answered, there would have been a good bequest of this residue, yet as the prior bequest had failed which was to constitute this residue, and as it was impossible to ascertain how much would have been employed in building the chapel, and no direction could be framed for the master to proceed upon on a reference to him, the testatrix having given no ground for inferring what kind of chapel was intended, this ulterior bequest was held to be void for uncertainty; and the real estate was decreed to the heir at law, and the personal to the next of kin. (4)

How general charitable bequests, without any specification of the objects, are dealt with in equity.

Where property is left generally, in trust for charitable uses without defining them, the Court of Chancery will uphold such a trust as a valid bequest: but then the application, either by the trustees or the Crown,

(4) The trust of an annuity for a charity charged upon a devised estate being held void under this statute, it was ruled that the annuity did not pass by the residuary disposition, but sunk for the benefit of the specific devisees, 12 Ves. Jun. 497. But note, there was an express exception out of the residue of what he had before disposed of.

must be to purposes expressed in the statute 43 Eliz. c. 9., or purposes analogous. If the charitable purposes be defined in the will, they must be such as the law recognizes as charitable purposes. But a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, cannot be supported as a charitable legacy, but would be void for uncertainty. Liberality and benevolence do not correspond with the legal notion of charity; and not coming within the compass of that term do not attract the same indulgence with which general charitable bequests have been treated by the Court. And therefore, in the case of Morice *v.* the Bishop of Durham, (*l*) where the bequest was in these terms, it was decreed a trust for the next of kin. For it was clear that a trust was intended; and wherever that is the case, and the trust is ineffectually created, or fails, the next of kin becomes entitled: but if no positive trust is intended to be created, but the devise leaves a discretion in the devisee to make the application or not, it is then considered as an absolute gift; for then the particular application pointed at is an act left to the option of the devisee, and not imposed as an obligation by the testament. And though words of recommendation and desire may impose a trust and be considered as imperative, yet that can only be where the objects are certain.

And what the legal notion is of charitable purposes.

In a word, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust.

Clause respecting colleges, &c.

By the 4th section of the statute above mentioned colleges and other establishments for learning are, as we have seen, excepted; with respect to which clause three important points were determined by Lord Keeper Henley, (*m*) *viz.* that a devise, not to the whole body

(*l*) 10 Ves. Jun. 522. And see Ommaney *v.* Butcher, 1 Turn. Rep. 260.

(*m*) Case of Christ's College, Cambridge, 1 Sir W. Blackst. 90.; and see Attorney-General *v.* Manby, 1 Meriv. 327; see also Emanuel College *v.* Bishop of Norwich, 4 Bro. C. C. 482.

corporate, but for the benefit of particular fellows, is good within the exception. That a devise to colleges as trustees for other charitable uses, is not within the exception; and that the exception extends only to colleges already established when the statute of mortmain was enacted.

When bequests are void as being connected with charitable purposes, and when not.

When a will contains devises in favour of particular persons, followed by dispositions of the same subject, or of interests out of it, for charitable purposes, void by the statute, and the benefit intended for the individuals is not involved with, or branching out of the charitable provisions, the particular gifts or limitations will be supported, though the bounty to the objects of general charity must fail. Thus where a testator devised lands to A., preacher at the meeting-house at Lyndhurst, to hold to him for life only upon the express condition that he should without delay after his (the testator's) decease, settle and convey the same to trustees to take place at his decease, for the use and support of the preaching of the word of God at the said meeting-house for ever; and in case such preaching should be discontinued, he directed the same to be applied towards a school for teaching the poor children of Lyndhurst for ever: there, though the subsequent limitation was void, the defendant's life-estate was held clearly good, his religious persuasion being no objection to his taking the estate. (*n*)

But where the private or particular bequest is blended or connected with the charitable purpose, and the will affords no clear indication that the particular bequest was intended to take effect independently of the charity, they must fall to the ground together. (*o*)

Superstitious uses.

We shall now slightly advert to the invalidity of all devises, whether of personal or real property, to uses

(*n*) Phillips *v.* Aldridge, 4 T. R. 264.; and see 10 Ves. Jun. 22. 2 Jac. & Walk. 276. 6 Madd. Rep. 71.

(*o*) Grieves *v.* Case, 1 Ves. Jun. 548. See Fonbl. Eq. 208, edit. 1818.; and see Attorney-General *v.* Hinxman, 2 Jac. & Walk. 277. The reader should be apprised that by the 52 Geo. 3. c. 101. a less expensive mode of application in charity cases is provided by petition, on which the proper enquiries may be directed.

denominated superstitious; a topic of less importance at the present time than formerly; and which indeed scarcely falls under the head of which we are treating, though it naturally arises out of the subject under consideration.

Superstitious uses are such as stand opposed, or are injurious to the simplicity, purity, and truth, of our national Protestant religion,—as where land or money is given to support masses, prayers for the dead, chantries, or the like. The statute 1 Edw. 6. c. 14. annuls the superstitious uses therein mentioned, and transfers the benefit to the Crown, but this only with respect to the uses to which there is an express allusion in that statute. All superstitious uses not comprehended within the same are merely void, and do not vest in the King beneficially. Still, however, the property does not result to the heir or next of kin, but becomes subject to the disposition of the King, who may direct the same to such charitable use as he may think proper, by his sign manual directed to the Attorney-General. (*p*) But in those cases wherein the charity is declared void by the statute of Mortmain the subject of the devise becomes the property of the heir at law, or next of kin.

In the case of Cary *v.* Abbot (*q*) where a Roman Catholic testator gave the residue of his personal estate for the purpose of educating and bringing up children in his own faith, the Chancellor, founding himself upon the expression of Lord Hardwicke in De Costa *v.* De Pas, (*r*) would not treat the bequest as being so wholly unavailing as not to be applicable to any other purpose. "There is no statute," said his Lordship, "making superstitious uses void generally. The statute of Ed. 6. relates only to superstitious uses of a particular description then existing. Here the use is clearly charitable in its nature, *viz.* for poor orphan children. What vitiates it is that they are to be educated in the Roman Catholic religion. I must declare the bequest void, but that it must go to such use as the King shall

(*p*) The King *v.* Lady Portington, 1 Salk. 162.
(*q*) 7 Ves. Jun. 490. (*r*) Ambl. 228.

direct. The Attorney-General, therefore, will apply for a sign manual."

The result of the cases on this subject appears to be this,—that where the superstitious use is within the statute of Edw. 6. the King becomes beneficially entitled to the subject of the devise or bequest by force of the express words of that law. If the gift be generally void, as being to a superstitious use not included within the terms of that statute, it rests with the King to determine the application by his sign manual, supposing the void use to be charitable in its nature as well as superstitious. But if the void use be merely superstitious, without any charitable destination, the title of the heir or next of kin takes place. (*s*)

Where the superstitious use is within the statute, the Crown takes beneficially.

If for a charitable object, the Crown disposes.

If superstitious, and not within the statute, the devise is merely void.

If the purposes be only in part superstitious, the Crown will, under the statute of Edward, if the case be within it, be entitled only to so much as is given to a superstitious use; unless the good uses be so blended with or dependent upon the bad as to be inseparable from them, and then the whole must go to the Crown. If the objects are blended, but the superstitious part of the case is not within the said statute, the whole falls to the ground together, as a consequence of intestacy.

If good uses are embodied with superstitious uses, the whole must fall as if no part were good.

A married woman may take as a devisee; and, unless the husband dissent in her lifetime, the subject of the devise becomes legally vested in her: and though he may avoid the gift at law, he cannot avoid a trust for her benefit. It may be doubted also, whether a court of equity would not interpose to give to the wife the benefit of a devise were a husband to exert his legal privilege of renouncing the gift. It is unnecessary to observe that a wife may take under a husband's will, though no grant to operate during the life of the grantor can take effect between them, as in law they are one person.

Married women, their capacity of taking.

An alien may take by devise under the statute of Wills, as he might have taken the benefit of a use under a will operating as a declaration of it, before the

Aliens,—their capacity.

(*s*) Attorney-General *v.* Whorwood, 1 Ves. Jun. 534.

statute. (*t*) He is capable of holding the estate so given to him as long as he lives, or till the claim of the Crown is declared by the finding of an inquest of office; the rule being that every person born in England is supposed a natural-born subject till the contrary is found by office. In the mean time the alien may exercise acts of ownership, such as barring remainders by a common recovery if he be tenant in tail: but if he die before office found, the inheritance is by law in the King for defect of heirs without office found. (*u*)

Disability of Papists.

By the 18 Geo. 3. c. 60. the disability to take lands by descent or purchase imposed upon persons professing the Popish religion by the stat. 11 & 12 W. 3. c. 4. was removed on condition of their taking the oath therein contained. The 31 Geo. 3. c. 32. has substituted a new oath in the place of that which was imposed by the 18 Geo. 3.: but as some doubts had arisen whether the persons taking only the oath prescribed by the 31 Geo. 3. would be entitled to the benefit of the act of the 18th of his late Majesty, so as to be relieved from the disqualifications from which that act intended to relieve them, (the principal of which were those which disabled them to take by descent or purchase) it was enacted by the 43d of the late King, c. 30. that the declaration and oath contained in the act of the 31st of the same reign should, as to all persons who should have taken or subscribed the same in manner therein mentioned, give the same benefit and advantages as in and by the said act of the 18th of his said Majesty was enacted and declared of and concerning the oath therein prescribed: so that persons professing the Roman or Popish religion have now the undoubted capacity of taking by will, which is one mode of taking by pur-

(*t*) This is an inference from what was law as to the covenant to stand seised to uses, upon which a use might arise to an alien. Godb. 275.

(*u*) 2 Roll. Rep. 321. 9 Co. Rep. 141. Gouldsb. 102. 4 Leon. 84. Bro. tit. Denizen and Alien, 17.; and see Co. Lit. 2 b. n. 1, 2, 3. and Bac. Abr. tit. Aliens.

chase according to the legal import of that term. The same act of the 31 Geo. 3. has also repealed the laws requiring the deeds and wills of Roman Catholics to be registered and enrolled.

By what designation a bastard may take.

The rule with respect to a bastard is, that he cannot be a devisee until he has gained a name by reputation. Bastards are *quasi nullius filii,* and are not considered as children for whom the consideration of blood will raise a use, as on the covenant to stand seised to uses; though without doubt upon a conveyance which passes the estate a use may be limited to a bastard *in esse,* where he is sufficiently described, as well as to any other person. But the description of child or children is not a designation under which children illegitimately born can in general take, where there are legitimate children to answer the description. Thus, where a man had issue a bastard, and afterwards married, and had issue by his marriage, and devised to his *children,* the bastard could not take by the will, not being recognized as a child by the law of England. (*x*)

Under the description of children generally, bastards cannot take.

And it was held that where A. had three sons, the eldest a bastard and the second a *mulier,* and a remainder was limited to the eldest issue of A., the mulier should take and not the bastard, for general words are to be taken *digniori sensu;* and it is laid down by Lord Coke that where the statutes of the 32 & 34 Hen. 8. speak of children, bastard children are not included in the term; (*y*) and that even where the mother gives to her own children, her bastard child is not a child within those statutes.

Bastards cannot take until they have acquired a name by reputation.

The Earl of Devonshire devised 3000*l.* to all the natural children of his son by Mrs. Heneage; and the question was, whether the natural children by Mrs. Heneage, born after the will, should take a share of the 3000*l.* Lord Chancellor Parker held that they should not.—"The Earl of Devon could never intend that his son should go on in this course. Besides, bastards could not take until they have gained a name by reputa-

(*x*) Moore, 10. pl. 39. (*y*) Co. Lit. 123 b. Dyer, 345.

tion. And it being a question whether a child *en ventre sa mere,* of the son by Mrs. Heneage, should take; Lord Parker inclined that such child could not take for the reason before mentioned, *viz.* that a bastard could not take until he had gotten a reputation of being such a one's child; and that reputation could not be gained before the child was born." And according to the registered decree his Lordship held that the money so given was a provision for such children or reputed children of the said son by Mrs. Heneage as were living at the time of the disposition, but not for such children as he afterwards had by her. (z) The law on this subject as laid down by Lord Coke in his Commentary(*a*) is, that a bastard, having gotten a name by reputation, may purchase by his reputed or known name to him and his heirs, although he can have no heir but of his own body. Thus if a man make a lease to B. for life, remainder to the eldest issue male of B., and the heirs male of his body, and B. has issue a bastard son, he shall not take the remainder because in law he is not his *issue;* for, *qui ex damnato coitu nascuntur inter liberos non computentur.* So it is, continues Lord Coke, if a man make a lease for life to B., the remainder to the eldest issue male of B., to be begotten of the body of Jane S., whether the same issue be legitimate or illegitimate, and B. hath issue a bastard on the body of Jane S., this son or issue shall not take the remainder; for, by the name of issue, if there had been no other words, he could not take; and, as it hath been also said, a bastard cannot take till after he hath gotten a name by reputation, that he is the son of B., &c.: and therefore he can gain no remainder limited before he be born; and if he cannot take the remainder by the name of issue at the time when he is born, he shall never take it. And so

(z) Metham *v.* The Duke of Devonshire, 1 P. Wms. 529. And see the late case of Lord Woodhouselee *v.* Dalrymple, 2 Meriv. 419, where illegitimate children were held entitled, there being no other to answer the legacy at the death of the testator, or at the date of the will.

(*a*) Co. Litt. 3 b., and see Litt. s. 118.

it seemeth, and for the same cause, that if after the birth of the issue B. had married Jane S., so as that such issue became bastard *eigne*, and had a possibility to inherit, yet he shall not take the remainder.

The case cited by Lord Coke as the authority for the above learning on the point was determined in the 38 & 39 Eliz. on a writ of error for land in Portington, and occurs in Cro. Eliz. 509., Noy. 35., and Moore, 430.; and likewise in 2 Roll. Abr. 43, 44. But Mr. Hargrave, in his note upon this passage, has observed, that the several reports of the case cited by Lord Coke in the margin differ very much. According to Noy and Moore it was held by all but Popham that the remainder was good, though the bastard was not born till after creating it; and Rolle represents the case as if the opinion had been for the remainder. But Croke agrees with Lord Coke, and writes "that a majority of the judges held the remainder void. In the only modern case on the subject the Lord Chancellor Macclesfield inclined against such a remainder, even though to a child *en ventre sa mere*. 1 P. Wms. 529. However, the doctrine does not seem fully settled."

The learned annotator does certainly represent the case in P. Wms. inaccurately. It is the above noticed case of Metham *v.* Duke of Devon, in which the Lord Chancellor *inclined* only against the child with which Mrs. Heneage was enseint: but as against the natural children by Mrs. Heneage born after the will, he was very decided, declaring without any doubt that such children should not take a share of the 3000*l.* given to the natural children of the Duke.

Nothing is now more clear than that bastards may take by purchase, if sufficiently described, that is, if described in terms which amount to a *designatio personarum;* and the above case of Metham *v.* the Duke of Devonshire may be considered as having, as far as its authority extends,—and, according to the present Lord Chancellor in Wilkinson *v.* Adam, (*b*) its authority has never been disturbed,—decided, that a man may give

(*b*) 1 Ves. & Beames, 422, 467.

to natural children, by their description as such, and as a class. In the last-mentioned case, under a devise by a married man having no legitimate children, "to the children which he might have by A., and living at his decease;" natural children who had acquired the reputation of being his children by her before the date of his will were held to be entitled, as appearing upon the whole will to have been plainly intended, and sufficiently indicated. It had been stated in the argument that a decision in favour of the children would introduce evidence which no Court ought to endure;—that the mother must be called for the sake of enquiring from her whether the illegitimate children were begotten by the testator or by other persons; but this his Lordship denied to be so, the true point of enquiry being, not who were in fact such children, but who had acquired the reputation of being so. The will in that case clearly manifested the intention in favour of illegitimate children, by their description as such; and extrinsic evidence was admitted to shew who had acquired the reputation of being such children. (*b*)

The subsequent case of Swaine *v.* Kennedey(*c*) fully confirms the doctrine that the term *children* is *prima facie* applicable only to legitimate children; and that unless there is strong evidence drawn from the will itself, of an intention in favour of illegitimate children, such children, though existing at the date of the will, are not entitled; nor can any extrinsic evidence be received to shew what the testator intended, but merely to ascertain who had acquired the reputation of children. These cases, however, left the point undetermined, whether a *future* illegitimate child can take under any description in a will. But in the case of Arnold *v.* Preston(*d*) it was unreservedly held by the Master of the Rolls, Sir William Grant, that a natural child cannot take by a prospective bequest made before his birth; though

Natural children cannot take under a prospective bequest.

(*b*) And see Lord Woodhouselee *v.* Dalrymple, 2 Meriv. 419. S. P. as to extrinsic evidence.

(*c*) 1 Ves. & Beames, 469.; see Beachcroft *v.* Beachcroft, 1 Madd. 430.

(*d*) 18 Ves. Jun. 288.

where the bequest was to the natural child of which a woman was enseint, *without reference to any person as the father,* such bequest has been since held good by Lord Chancellor Eldon, there being no uncertainty in the object described. (*e*) The distinction taken by the Master of the Rolls in Eade *v.* Wilson (*f*) between the case of giving a legacy to a child of which an unmarried woman is pregnant generally, and to the child of which she is pregnant by a particular person, on the ground that you cannot in the latter case try the fact whether it is or is not the child of the particular man so named in the will, was adverted to, but neither adopted nor rejected, by Lord Eldon in the case of Gordon *v.* Gordon, above referred to.

Devise to a child *en ventre sa mere.*

A devise to a child in the womb of its mother, or, as the law expresses it, *en ventre sa mere,* when so worded as to indicate a future gift, or in legal language *per verba de futuro,* seems to have been always deemed effectual by way of executory devise: but where such a gift was expressed in words of present import, or *per verba de præsenti* according to technical phraseology, a great variance of opinion among very eminent men as to the validity of such a disposition appears in the books. The opinion best supported, however, and most in credit, appears to have been in favour of its validity, upon the ground of the manifestation of future intention in the very words of such a devise; for where a testator takes notice that the devisee is *en ventre sa mere,* it seems impossible to doubt his intention to give what is to take effect at a future time, or to consider the words as importing less than if the testator had added, "when he or she shall be born." The statute 10 & 11 W. 3. c. 16. has been said to put posthumous children upon the same footing to all intents and purposes, with children actually born.(*g*) So that it can hardly be doubted that a devise at this day to a child *en ventre sa mere* would be perfectly good, though expressed in words of present import.

(*e*) Gordon *v.* Gordon, 1 Merivale, 141.

(*f*) 17 Ves. Jun. 528. (*g*) 4 Ves. Jun. 334. 1 T. R. 634.

CHAP. III.

FORMAL AND INSTRUMENTAL REQUISITES.

SECT. I.

Signature and Subscription.

Of the signature of the testator, and the subscription of the witnesses.

THE formalities required by stat. 29 Car. 2. c. 3. are, 1st, that the will be in writing;—2d, that it be signed by the devisor, or some other, in his presence and by his direction;—and, 3d, that it be attested and subscribed in his presence, by three or more credible witnesses. The clause in question is as follows:—"And be it further enacted that from and after the four and twentieth day of June, all devises and bequests of any lands or tenements, devisable either by the statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect."

What is a sufficient signing.

If the language made use of by the Legislature were to be understood in its natural and usual sense, it would seem that there could be no great contention in regard to the meaning of the words 'shall be signed by the devisor,' which are generally considered as importing the actual and formal subscription of the name of the

party at the bottom of the instrument. And by directing this to be attested by three witnesses, in the testator's presence, the statute at first view seems to require that the attestators should have ocular evidence of the act of signing performed by the testator.

Very soon, however, after the Legislature had thought fit to place these guards about a dying man, in this last and important act, courts of justice, yielding to the popular bent towards freedom and facility in all alienations of property, instead of strictly executing the intention of parliament, seem to have studied to frustrate its caution.

It has been held a sufficient signing if a will be written by a testator's own hand, with his name inserted.

In the case of Lemayne *v.* Stanley, (1) which was determined about four years after the statute was passed, the solemnity of signing was treated with very little regard. Stanley, seised in fee, wrote his will with his own hand, beginning thus,—"In the name of God, Amen. I, John Stanley, make this my last will and testament," and he thereby devised the lands in question, and put his seal, but did not subscribe his name; but three witnesses subscribed the will in his presence. And whether this was a good will to pass lands within the statute of Frauds, was the question. After several arguments, it was adjudged by the whole Court, consisting of North, Ch. J., and Wyndham, Levinz, and Charlton, Justices, to be a good will; for being written by himself, (2) and his name being in the will, it was a sufficient signing within the statute, which did not appoint *where* the will should be signed, at the top, bottom, or margin, and that therefore a signing in any part was sufficient. And soon after, in the 37th year

(1) 3 Lev. 1.; and again in the case of Hilton *v.* King, Lord North and Levinz agreed that it was immaterial whether the signing be at the top or bottom of the will, for the statute doth not say subscribed, but signed by the testator. And see Morrison *v.* Turnour, 18 Ves. Jun. 183.

(2) The emperors Theodosius and Valentinian allowed every holograph testament to be available, though made without witnesses, Novell. Theod. lib. ii. tit. 4.

of the same king, the doctrine was stated still more loosely by Lord Chief Justice Jefferies, who, the report (*a*) says, seemed to hold that a will written all by a testator's own hand, and acknowledged in the presence of three credible witnesses, would be within the intention of the statute, though it were not signed by him according to the words of the act. And this doctrine has been acceded to as settled whenever it has since come under consideration. So in Stokes *v.* Moor, (*b*) the case of an agreement was said to be like that of wills, upon which it was said to have been determined, that the testator's writing his name in the introduction of the will was a good signing within the statute. In the case of Coles *v.* Trecothick (3) Lord Eldon took notice that it had been often held in respect to wills, that if a testator begins his will with the formal introduction of "I, A. B., do make this my last will," it was a sufficient signing.

But if the testator *begins* to sign in *regular form*, and does not complete it, the statute, as it seems, is not satisfied.

In Right *v.* Price (*c*) there was an appearance of greater strictness. According to which case it appears that if the testator *shews an intention* to subscribe the will in regular form, by beginning to write his name at the bottom, but being overtaken by weakness or incapacity before he has completed such intention, he becomes incapable of executing his purpose, the will is not sufficiently signed within the act. In that case a will had been prepared in five sheets, and a seal affixed to the last, and, likewise, the form of attestation was

(*a*) Anon. Skin. 227. (*b*) Dougl. 241.
(*c*) 1 P. Wms. 771, note, and *vide supra.*

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(3) 9 Ves. Jun. 249. But his Lordship seemed to think, that for this formal introduction to be a sufficient signing, it should be one simultaneous act, and that the whole act or intended instrument should be in the contemplation of the testator at the time of his writing such formal introduction. And in this view it may deserve consideration how far, if a will be written on different pieces of paper, or at different times, such a formal beginning will be equivalent to a regular signing.

written upon it, and the will was read over to the testator, who set his mark to the two first sheets, and attempted to set it to the third; but being unable from the weakness of his hand, he said, "he could not do it, but that it was his will." And on the following day being asked if he would sign his will, he said "he would;" and attempted again to sign the two remaining sheets, but was not able to do it. The case was decided upon another ground: but the Court of King's Bench seemed to be of opinion that this was not a sufficient signing; for the testator, when he signed the two first sheets, had an intention of signing the others. He did not, therefore, mean the signature to the two first sheets as the signature of the whole will; and consequently there never was a signature of the whole, but only a beginning to sign.

In Lemayne *v.* Stanley, the writing of the name in the introduction of the will was all the signing contemplated by the testator; and as far as such a mode could be held a literal accomplishment of the statute, his intention in respect to his will was completed, his mind being in no suspense, nor looking to any further or future act of authentication. But in Right *v.* Price, the testator expressly announced an intention to authorize the instrument in a regular and solemn way, and therefore his will seemed to be inchoate until this was done: why it was not done was to be explained; and so the case could only be established by those parol proofs which it was the object of the statute to exclude.

Whether sealing is signing.

In the case of Lemayne *v.* Stanley, above cited, three of the judges, including the chief, were of opinion that the testator, by *putting his seal* to the will, had sufficiently signed within the statute, for they said that the *signum* was no more than a mark, and sealing was a sufficient mark that it was his will.

In Warneford *v.* Warneford, (*d*) which, after a long interval, seems to have been the next case in which this

(*d*) 2 Str. 764.

question came to be considered, it is said to have been held by Lord Raymond, on an issue out of Chancery of *devisavit vel non,* that *sealing* a will was a *signing* within the statute of Frauds. We are to observe, that in Lemayne *v.* Stanley the opinion of the judges must be regarded as spoken *obiter,* the case being decided on the ground of the sufficiency of the insertion of the name in a will, written by the testator; and the point in Strange, as stated only in a short note, was agitated at Nisi Prius only. But this doctrine was ill received in the subsequent case of Smith *v.* Evans, (*e*) wherein Lord Chief Baron Parker, Baron Clive, and Baron Smith, (in the absence of Baron Legg) are stated to have said that the opinion of the three judges in Lemayne *v.* Stanley was very strange; for that if it were so it would be very easy for one person to forge another man's will, by only forging the names of any two persons dead, for he would have no occasion to forge the testator's hand.

And the same judges declared, that if the same thing should come into question again, they would not hold that *sealing* a will *only* was a sufficient signing within the statute. The Chief Baron seems to have been less resolved on the same question, in the opinion delivered by him in Ellis *v.* Smith, (*f*) in which he thus expressed himself: "As to the point, whether sealing be signing, —I own I think it is not; for the character and handwriting are necessary, and were designed to prevent or detect frauds and impositions. But, however, said his Lordship, as in some cases it has been thrown out *obiter,* and in one case decreed that it is equal to signing, I shall submit my opinion." But Willes, C. J. said decidedly in the same case, that he did not think *sealing* was to be considered as *signing;* and he added, that he declared so then, because if that question ever came before him he should not think himself precluded

(*e*) 1 Wils. 313. (*f*) Reported in 1 Ves. Jun. 11.
(*g*) Grayson *v.* Atkinson, 2 Ves. 459.

from weighing it thoroughly, and decreeing, that it was not signing, notwithstanding the *obiter dicta*, which in many cases were *nunquam dicta*, but barely the words of the reporters; for, upon examination, he found that many of the sayings ascribed to that great man, Lord Chief Justice Holt, were never said by him. (4)

The opinion of Sir John Strange, Master of the Rolls, was on this point agreeable to that declared by the Chief Justice. He observed, that he was not convinced that sealing was signing; for sealing *identified* nothing; it caried no character; and most seals were affixed by the stationers who prepared the paper. Lord Hardwicke did not, according to the report, speak, in this case, as to the question of sealing: but in a case which had been determined by him two years before,(*g*) his Lordship had expressed himself in stronger language to the same effect with the Lord Chief Justice Willes and Sir J. Strange. He then declared, that the statute, by requiring the will to be signed, undoubtedly meant some evidence to arise from the hand-writing: then, how could it be said, that putting a seal to it, would be a sufficient signing? for any one may put a seal; no particular evidence arises from a seal; common seals are alike; no certainty or guard therefore arises from thence."

Whether making a mark, where the party is unable to write, is a sufficient signing or subscribing.

Till a late case it was a considerable doubt with the profession, whether, if a testator or witness could not write his name, he might satisfy the statute by making his mark. In Lemayne *v.* Stanley, as it is reported in Freeman, (*h*) it is said that the court were of opinion, that it was not necessary for the testator to write his name; for some cannot write, and then their mark is a sufficient signing. But this opinion, though entitled to

(*g*) Grayson *v.* Atkinson, 2 Ves. 459.
(*h*) Freem. Rep. 538. and see 17 Ves. Jun. 459.

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(4) See Show. 69. Lea *v.* Libb, where Lord Holt is *said* to have held sealing to be a signing.

great deference, as being stated to have been that of the court, and not of a single judge; yet, as being uncalled for by the facts of the case, must be regarded as extra-judicial. Hudson's case, (*i*) which was determined about a year after Lemayne and Stanley, where two witnesses swore that J. S. the testator did not publish the writing as his will, but that A. B. guided his hand, and J. S. made his mark, but said nothing, is too mixed a case to be admitted as an authority to this point.

The observations made by Sir John Strange in the above cited case of Ellis *v.* Smith, on the question as to sealing, do certainly seem as strongly to apply to a testator's mark; for it identifies nothing, it carries no character. But in the late case of Harrison *v.* Harrison, (*k*) it was decided by Lord Eldon, that the attestation of a devise by a mark, was good within the statute; and as the statute requires the attestators to *subscribe*, and the testator to *sign*, it may be thought that the principle of this determination is applicable *a fortiori* to the signature of the testator himself, since the word 'subscribe' seems much more forcibly to point to the actual handwriting, than 'sign,' which, without any strain upon its grammatical sense, though, perhaps, not without some sacrifice of its popular and usual acceptation, might be deemed to be satisfied by *any symbol* of the testator's consent and ratification. (5)

In the above-mentioned case of Harrison *v.* Harrison, the question was made upon a bill by devisees against the heir, whether the will was duly executed to pass real estate according to the statute of Frauds, one only of the witnesses having subscribed his name, the two other

(*i*) Skin. 79. (*k*) 8 Ves. Jun. 185.

(5) The counsel for the plaintiff is stated to have adverted to the difference of expression in the statute, with reference to the witnesses and the devisor; and to have remarked the difficulty of making the proof, in case of the witnesses being dead.

having attested by setting their marks respectively. Lord Chancellor Eldon observed, that upon inquiry from Mr. Serjeant Hill, he had found, that there was a special case reserved in the Court of Common Pleas, upon the question, whether a will devising real estate was well executed, one of the witnesses being a marksman; and it was held clearly sufficient. It was a case of Gurney *v.* Corbet, in 1710, in a note-book, which was the property of Mr. Justice Burnet. His Lordship said, he thought there might have been a great deal of argument upon it originally; but that upon this authority the plaintiff must take a decree. In a few months afterwards the same point was determined by Sir William Grant, Master of the Rolls, in Addy *v.* Grix, (*l*) agreeably to the decision of the Chancellor in Harrison *v.* Harrison, and it therefore seems now to be at rest. (6)

It is sufficient if the witnesses attest upon the *acknowledgment* by the testator of his signature, without seeing him *actually sign.*

It seems to be fairly inferible from the decision in Lemayne *v.* Stanley, that the court were of opinion, that it was not necessary that the witnesses should attest the very act of signing, but that an acknowledgment by the testator, that the act of signing was done by him, was sufficient for them to attest; for since, not the sealing, but the writing over the will, with the testator's name in it, was the ground of the decision, the witnesses must have seen this done, if it was judged insufficient for them to attest upon the acknowledgment of the testator: but this was not so found by the jury, or it would have put an end to all controversy upon the case; and if the witnesses did not attest the writing of the whole will by

(*l*) 8 Ves. Jun. 504.

(6) According to the report of the case of Lemayne *v.* Stanley, in Freeman, the court were of opinion, that if the testator had his name on a stamp, it would be enough if he impressed his name instead of writing it. And in Strange *v.* Barnard, 2 Bro. C. C. 585. it was held, that stamping was equivalent to sealing. By the civil law, if a testator could not write, he was not admitted to make his mark, but an eighth subscribing witness (seven being the ordinary legal number) was called in to subscribe in the place of the testator. C. 6. 23. 1.

the testator, their attestation could only go to his acknowledgment of his signature. This point, however, seemed to exist in some doubt during a long time after the statute was passed. In Dormer *v.* Thurland, (*m*) where the will was not signed by the testator in the presence of the witnesses, but he acknowledged it to be his hand, and declared it to be his will in their presence, Lord Chancellor King inclined to think that the will was good, but ordered the point to be reserved, and made a case for further consideration. (7)

However, in a case,(*n*) which came before the Master of the Rolls (Sir J. Jekyll) a few years afterwards, the will was held good, though the witnesses did not see the testator sign it, but he owned it before them to be his hand. And the reporter adds, that on his mentioning this opinion of the Master of the Rolls to Mr. Justice Fortescue Aland, he said it was the common practice; that he had twice or thrice ruled it so upon evidence on the circuit; and that it was sufficient if one of the three subscribing witnesses swore that the testator acknowledged the signing to be his own handwriting.

Sir Joseph Jekyll had delivered a similar opinion, a little before, in a case of Smith *v.* Codron, cited by Lord Hardwicke, in Grayson *v.* Atkinson. (*o*) In that case A. had signed and published a will in the presence of two persons, who had attested it in his presence; then a third person was called in, and the testator, shewing him his name, told him that that was his hand, and bid him witness it, which he did, and subscribed his name in the testator's presence; and the testator, two hours after told him that the paper he had subscribed was his will. His Honour held this to be a good execution.

But in the instructive case of Grayson *v.* Atkinson,

(*m*) 2 P. Wms. 506. (*n*) Stonehouse *v.* Evelyn, 3 P. Wms. 252.
(*o*) 2 Ves. 455.

(7) The judges of B. R. on argument held the will void, as a charge, for want of being sealed according to the direction of the power.

above referred to, this point came fully under the consideration of Lord Hardwicke. The bill was to establish a will against an heir at law, who, by his answer, raised the doubt, whether, as all the witnesses did not see the testator sign, though *he* saw *them* all sign, this was a good attestation within the statute. The Chancellor, adverting to the argument of the counsel for the defendant, in which they had insisted that the word '*attested*' superadded to '*subscribed*,' imported that the attestators should witness the very act of signing, and that the testator's acknowledging that act to have been done by him, and that it was his handwriting, was not sufficient to enable them to attest, but that it should be an attestation of the thing itself, and not of the acknowledgment, observed, "that certainly there must be an attestation of the thing in some sense: but the question was, whether, if they attest on the acknowledgment of the testator that that was his handwriting, that was not an attestation of the act, and whether it was not to be construed agreeably to the rules of law and evidence, according to which all other attestation and signing might be proved. At the time of making that act of parliament, and ever since, if a bond or deed was executed and signed, and afterwards the witnesses were called in, and before the witnesses, the person making it, acknowledged the signature to be his hand-writing, that was always considered as an evidence of signing by the person executing, and was an attestation of it by them.

"It is true," said his Lordship, "there is some difference between the case of a *deed* and a *will* in this respect, because signing is not necessary to a deed, but sealing is; and I do not know that it was ever held, that acknowledging the sealing without witnesses has been sufficient.(8) But, nevertheless, that is the rule of evi-

(8) But if the handwriting to a deed be proved, the sealing and delivery may be presumed: if, therefore, the signature to a deed be

dence in respect to signing. If it were in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing, if that instrument be attested by witnesses, proving that they were called in, and that the party took up the instrument, and said, that was his hand, such would be a sufficient attestation of the signing by him. That is the rule of evidence. Considering, therefore, the words of the act of parliament, it seems that if the testator having signed the will, did, before the attestators, declare and acknowledge he had so done, and that the signature was his hand, that might be sufficient to make the attestation good."

The case of Ellis *v.* Smith (*p*) came on in 1754, which was about two years after Grayson *v.* Atkinson; and the Lord Chancellor Hardwicke was assisted by Sir John Strange, Master of the Rolls, Willes, Chief Justice of B. R., and Parker, Chief Baron. The form in which the question is reported to have been put, was, whether a testator's declaration before three witnesses, that it was his will, was equivalent to signing it before them, and constituted a good will within the 5th section. The determination of Grayson *v.* Atkinson by Lord Hardwicke was in this case mentioned by the Master of the Rolls, as an authority full to the point upon the first question; and his Honour said, that to determine otherwise at that time, would introduce confusion and uncertainty, and sap the foundation of much property which rested on former decrees.

The court was unanimous, in holding such acknowledgment by a testator to the attestators of his will to be good within the statute; and the Chief Justice declared, that his opinion was virtually supported by those cases which had decided the attestation and subscription

(*p*) 1 Ves. Jun. 11.

acknowledged to an attestator, the rest seems to follow, see Grellier *v.* Neale and others, Peake, Ni. Pr. Ca. 146. See also Park *v.* Mears, 2 Bos. et Pull. 217.

of the witnesses *at different times*, to be good; for then, a testator is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two;—and why should not his acknowledgment to the three be equally good? The Chancellor also observed that those cases supported the one before him from their *direct similitude*, and not from any consequential reasoning; for he apprehended that the determination in all those cases was grounded on this, that a declaration by the testator was good; for if he signed three times, there were three executions, and none could be good within the statute. (9)

The late case of Addy *v.* Grix (*q*) shews it to be the present sense of the courts, that this point is settled. The bill was filed to carry into execution a devise of real estate in trust to be sold. One of the witnesses by his depositions stated, that he did not see the testator execute, but that the testator took the will in his hand, and said the will, and also his name, were of his handwriting. The Master of the Rolls, without difficulty, admitted the sufficiency of the attestation.

(*q*) 8 Ves. Jun. 504.

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(9) The reporter has added a note, wherein he questions the propriety of this dictum of Lord Hardwicke, which had first fallen from the Lord Chief Justice; observing that it was hard to say that such declaration or acknowledgment would be sufficient in any case where *actual signing* would not do. But it is to be observed, that the acknowledgment or declaration is not supposed to stand in the place of, or be equivalent to a distinct act of signing, but to give effect to the attestation of the act of signing already done. See the case of Westbeech *v.* Kennedy, 1 Vesey and Beames, 362.

SECT. II.

Formality of Publication.

THE acknowledgment of the signing to the three subscribing witnesses seems, according to the principles on which many cases have been decided, to comprise the efficacy of what the law means to express by the *publication* of the will; the manner of effectuating which, was often a judicial question before the statute of Frauds. The term itself, *publication*, seems never to have borne any very precise or appropriate meaning, or to have indicated any certain and fixed form. After the statute of Wills had established the direct testamentary power, accompanied with the obligation of declaring the will by writing, these parliamentary wills were thought to require a very slight degree of formal publication superadded to the solemnity and durability of writing; and the cases shew, that, before the statute of Frauds, very little, if any, verbal formality was thought necessary to accompany the written declaration.

Thus, a very few years before the statute of Charles was enacted, it was resolved, in the King's Bench, by the whole court, on a trial at bar in an issue out of Chancery, 1st, that if a man draws up his own will, and sends it to counsel to be advised of the legality of it, this is no will, unless it had a publication after he received it back from his counsel: but, 2d, that if, after the will came from the counsel with alterations made by him, the party put his seal to it, or *subscribed* his name, or wrote upon it, 'this is my will,' though there were no witnesses to it; yet this was a good publication, because by any of those expressions, the testator declared his intent that it should be his will.(*r*) In Peate

(*r*) Bartlett *v.* Ransden, et al. Trin. 15 Car. 2. B. R. Vin. Abr. tit. Dev. (N. 2.) pl. 16.

v. Ougley, (*s*) Sir John Hollis mentioned a case determined by Lord Shaftesbury, before the 29 Car. 2. in which, though the testator wrote his will with his own hand, and also these words '*signed, sealed, and published in the presence of,*' and no witnesses had subscribed it, it was held a sufficient publication. And in the principal case, because these words, *signed, sealed, and published in the presence of,* were written at the top of the will for want of room below, in the testator's own hand, and then the names of the three witnesses were subscribed, though one witness (the other two witnesses being dead) deposed, that himself and the other two witnesses were called up in the night, and sent for to the testator's bedchamber, who produced a paper folded up, and desired him and others to set their hands as witnesses to it, which they all three did in his presence, but *without seeing any of the writing,* or *being told by the testator it was his will,* or *what it was,* but that he believed it to be the same paper, because his name was there, and the names of the other witnesses, and he never witnessed any other paper for the testator: this was held to be a sufficient publication of the will, after the statute of 29 Car. 2. In Ross *v.* Ewer (*t*) Lord Hardwicke mentioned a case of Mr. Windham in the Court of King's Bench, which was a trial at bar, upon the will of his uncle, wherein the only question was whether the testator *published* it. There was no doubt of his having executed it in the presence of three witnesses, or of their having attested it in his presence; which shewed, his Lordship said, that *publication* is, in the eye of the law, an *essential* part of the execution of a will, and not a mere matter of form.

The point therefore seems subject to some doubt, whether *publication* is to be considered as a mere vague term, expressing generally the act of authenticating and announcing the veritable will of a testator, but depending as to the mode by which it is to be effectuated on

(*s*) Vin. Abr. tit. Dev. (N. 7.) pl. 12. (*t*) Atk. 161.

the particular ceremonies and solemnities prescribed by the Legislature, or as implying a specific obligation upon the testator *beyond* the execution and attestation of the will according to the statute of Frauds. If any positive declaration by the testator that it is his will be necessary to constitute a sufficient publication since the statute, it does not seem that the mere acknowledgment of the signing can operate as an equivalent; for the *acknowledgment* of the signing, unless the testator at the same time acknowledge his will, cannot be more extensive in effect than the *act* of signing in the presence of the witnesses. Upon the whole, however, we are to consider that, great as is the weight of Lord Hardwicke's opinion, it was delivered on this point in Ross *v.* Ewer, gratuitously and extrajudicially; whereas the cases of Peate *v.* Ougley, Trimmer *v.* Jackson, Stonehouse *v.* Evelyn, and others, which have been cited for the contrary doctrine, are direct authorities.

SECT. III.

Wills interrupted and resumed.

A will, though it be proceeded in at *different times*, and often suspended and resumed, will need only one execution.

IT is established by the agreement of all the cases, that a testator may make his will at different times, if the subsequent writing takes up and continues the former; and it matters not by how long intervals these acts are separated; they will compose one entire instrument, if the first purpose appears to have proceeded to its accomplishment, though with many pauses and resumptions. Thus, (*u*) where an illiterate person made and signed his will, in which there was a devise of lands, and at a subsequent period added more to it *on the same sheet of paper*, and declared that he did not thereby

(*u*) Carleton *v.* Griffin, 1 Burr. 549. Carth. 37. arguendo; and, as it seems, agreed to by Dolben, J.

mean to disannul any part of his former devise and disposition, and signed it, and then took the sheet of paper in his hand, and declared it to be his last will and testament in the presence of three witnesses, and desired the witnesses to attest it, which they did in his presence: this was held to be one entire will, though made at different times, and to be attested agreeably to the statute of Frauds; or, in other words, the additional writing was held to be part of *one entire will*, and not a *codicil*, and the execution and attestation to be an *original* publication, and not a *re*-publication.

Of the execution of a will written on *different pieces of paper.*

But where the will was written on different pieces of paper, it was holden that the witnesses ought to see *all* the pieces of paper, or the will was not properly attested. Thus, in ejectment, (*x*) where the special verdict set forth, that J. D. made his will in 1670, with two witnesses who subscribed their names in his presence; and in 1679, made a codicil, and thereby confirmed his will in what was not altered, and inserted some new bequests, and there were two witnesses to it, one of whom had witnessed the will, and the other was a new one; the only point was whether these made together three witnesses to the will, to satisfy the statute of Frauds: but the court decided against the devise, because the third witness was not a witness to the first will. There was no entire instrument attested by three witnesses. (1) And if the additional writing were not

(*x*) 2 Mod. 263.

(1) The reader should compare this case of Lea *v.* Libb with Bond *v.* Seawell, 3 Burr. 1773. Blackst. 407. 422. 454. in which latter case it was proved, that C. made his will, consisting of two sheets of paper, all of his own handwriting, and signed his name at the bottom of each page; and that he also made a codicil of his own handwriting upon one single sheet, and then called in H. and shewed him both the sheets of his will, and his signature to every page thereof, and told him that *that* was his will, and then he shewed H. the codicil, and desired him to attest both the will and codicil: which he did in the presence of the testator, and then went out of the room. V. and L. came in immediately afterwards, and the testator shewed them the

a resumption and continuation of the former, but a distinct act and disposition by way of codicil, it might operate as a republication of the will as to lands, if both the will and codicil were attested, respectively, accord-

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codicil, and *the last sheet of his will*, and sealed both before them. C. then took each of them up severally, as his act and deed for the purposes therein mentioned. Then the witnesses attested the same in the testator's presence, but *never saw the first sheet of the will; nor was that sheet produced to them; nor was the same or any other paper upon the table; both* the sheets of the will were found *with the codicil* in the testator's bureau, after his death; all wrapped up in one piece of paper; but the two sheets of the will were not pinned together: and the question upon these facts was whether this will was duly executed according to the statute of Frauds?

After three several arguments before the Court of King's Bench, and one argument before all the judges in the Exchequer Chamber, Lord Mansfield delivered the judgment. His Lordship said, that the question made at the trial, and submitted by the case, as it stood, turned upon the solemnity of the execution; and they were of opinion, that the due execution of this will could not be come at, in the method wherein the matter was then put; that if this were considered as a special verdict, they thought *it was defectively found as to the point of the legal execution of the will.* But that every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention, and that they all thought the circumstances sufficient to *presume*, that the first sheet was in the room; and that the jury ought to have been so directed: but upon a special verdict nothing could be presumed; therefore, they were all of opinion, that it ought to be tried over again; and if the jury should be of opinion, *that it was then in the room*, they ought to find for the will generally, and they ought to presume from the circumstances proved that it *was* then in the room.

The case of Lea *v.* Libb was also on a special verdict, and therefore no facts could be presumed: but it does not seem that the case afforded the same ground of presumption, as that of Bond *v.* Seawell, in which last case there were *three witnesses*, if any, to the *whole* will; for the question was not as to the complement of witnesses, but whether the *whole* will, (the first sheet not having been seen by them,) was covered by the attestation; whereas, in Lea *v.* Libb, it was necessary to make the will and codicil *one* instrument, before the attestation could be held sufficient, for to neither, and to no part of either, were there three witnesses; and if they were *distinct* instruments, it seems, according to the authorities, that each ought to have been attested by three witnesses, to have been valid within the statute.

ing to the statute: but if the will were not so executed and attested, the codicil would not help the defect, although it had the requisites of the statute; for what was bad in its *creation,* could not be made good by any thing *ex post facto;* and the operation of a codicil, where it is a republication, is only to set up the will in its *original state and efficacy,* making it *as far as it was efficient in itself by the solemnities of its execution and legal compass of expression,* reach to the date of the codicil, and embrace intermediate acquisitions.

Thus a testator (*y*) devised his lands to trustees and their heirs, in trust for maintaining and providing for the poor scholars of a college in Cambridge, and for other charities, and the will was written with his own hand, but had no witnesses; and afterwards he made a codicil, which was duly executed and subscribed by four witnesses, wherein he recited and took notice of the will. And one of the questions in the case was whether the codicil was a good publication of the will within the statute of Frauds? It was contended on behalf of the devisees, that the codicil taking notice of the will, and being duly executed, made the will valid in the same manner as if it had been affixed to the will at the execution thereof; for the law would construe it as a part of the will, and its being laid in a different place signified nothing. But it was held, that the will was void; for though there were three subscribing witnesses to the *codicil,* yet that would not support the *will.*

Of the difference between a writing in continuation of a will formerly begun, and a re-publication.

This difference between the relation which a codicil bears to a will, once completed according to the then existing intention, and that which subsists between the interrupted stages of one entire testamentary act, is not difficult to understand as a proposition, though very difficult to explain by example or apply in practice. Upon this distinction, however, will, it seems, depend

(*y*) Attorney-General *v.* Barnes, 2 Vern. 597. Prec. in Ch. 270.

the question, whether or not the *first* act of testamentary disposition will require to be executed and attested according to the statute.

But whether the *subsequent* writing be considered as a republication by way of codicil, or as the conclusion of something already begun, as in the case just mentioned of Carleton *v.* Griffin, it appears quite clear, that such *subsequent* writing, to be effectual to pass land, must be executed and attested as the statute directs, in the case of devises of lands.

The subscription of the witnesses need not take notice that they attested in the testator's presence.

It was early decided that a will of lands was good where the three witnesses subscribed their names at several times, without being present at once together. (*z*) And though the witnesses must subscribe the will in the presence of the testator, it is not necessary that in such subscription *notice* should be taken of the *fact of its having been done in the presence of the testator,* for this is not in terms required by the statute; and whether it be so expressed or not, it must be proved to have been so done, to the jury.

The question on a case reserved (*a*) on the trial of an ejectment brought by the heir, for the opinion of the Court was, whether it should be left to a jury to determine whether the witnesses to a will (*being all dead*) did or did not set their names *in the presence of the testator,* and this merely upon circumstances, without any positive proof; and the Court thought that it was a matter fit to be left to a jury: for they said, the witnesses, by the statute of Frauds, ought to set their names in the presence of the testator, but it is not required by the statute, that this should be taken notice of in the subscription to the will; and whether *inserted* or not, it must be *proved;* and if inserted, it does not *conclude,* but may be proved *contra,* and the verdict may find *contra.* Then if not conclusive *when inserted,* the *omission* would not conclude on the *negative* side; and

(*z*) Freem. 486. Anon. 2 Cha. Ca. 109. Anon.

(*a*) Hands *v.* James, Com. Rep. 531, *et seq.*

therefore, *it must* be proved by the best proof the nature of the thing is capable of. And they further said, that in case the witnesses were all dead, there could not be any *express* proof, since at the execution of wills oftentimes none are present but the devisor and witnesses. The proof must, therefore, as in other cases, be circumstantial; and there were sufficient circumstances in the case, 1st, three witnesses had set their names, and it must be intended they did it regularly; 2dly, one witness was an attorney of good character, and might be presumed to understand what ought to be done. And the question being on a matter of fact, it ought to be left to the jury, like the question whether livery was given on a feoffment where no livery was indorsed; and whether a deed was executed, where the counterpart only was produced.

To the same effect was the case of Croft *v.* Paulet,(*b*) where the words of the attestation were "signed, sealed, published, and declared, as and for his last will, in the presence of us, A., B., and C." And it being objected that the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence of the testator was not one; the Court, on the authority of the case of Hands *v.* James above cited, said it was evidence to be left to a jury, with all the circumstances; and a verdict was given for the will.

The same point was decided in the same way a few years before by Lord Chief Justice Willes, and the rest of the Court of Common Pleas, in the case of Brice *v.* Smith, (3) where also the witnesses were all dead.

(*b*) 2 Str. 1109.

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(3) Willes's Rep. 1. Com. Rep. 539. S. C. But the report in Comyns seems to be a little inaccurate in saying that nothing but the names of the witnesses were subscribed; the attestation being expressed in the same words as in the above-mentioned case of Croft *v.* Paulet, "signed, sealed, published, and declared by the said testator, to be his last will and testament, in the presence of us," &c. See the note of the Editor, Willes, 4 (*b*).

SECTION IV.

Qualification of Witnesses.

IN Hudson's case (reported in Skinner, 79,) it was proved that the witnesses had been dealt with; upon which it was urged by the counsel, that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute; to which Chief Justice Pemberton answered, that if there were three witnesses to a will, whereof one was a thief or person not credible, yet the words of the statute being satisfied, and there being collateral proof to fortify the will, he would direct the jury to find it a good will. By which it should seem that we ought to understand his Lordship to mean, that if there was nothing at the time of the attestation to impeach the competency of the witnesses, they must be regarded as credible witnesses at that time, within the proper interpretation of the word *credible*, as used by the statute. But if a witness be *convicted* of felony, and so rendered infamous, at the time of his subscribing the will, it seems not to have been doubted but that the will was invalid for defect of a sufficient attestation.

What offences disqualify.

Crimes which stigmatize a man with infamy when convicted thereof, such as treason, felony, conspiracy at the suit of the Crown, perjury, forgery, barratry, attaint of false verdict, and which disqualify him for giving evidence upon a trial in a court of justice, disqualify him also for becoming a subscribing witness to a will. (c) It seems, indeed, to have been formerly a notion that every offence for which a man had been caused or even sentenced to be set in the pillory, on account of the infamy of the punishment, rendered

It is the infamy of the *offence*, and not of the *punishment*, which disqualifies.

(c) Com. Dig. tit. Temoigne, A. 2.

him incapable of giving testimony;(*d*) but more modern cases have established, that the infamy of the *crime* and not the infamy of the *punishment*, is the ground of disqualification; and according to the present doctrine, persons who have suffered an infamous punishment, unless the offence for which it was inflicted on them was of the species of *crimen falsi*, or other crime of an infamous nature, are not disabled from giving their testimony in a court of justice, however much their credit with the jury may be affected by such a fact. Before the statute of 31 Geo. 3. (*e*) persons convicted of petit larceny were judged not to be credible witnesses to attest a will under the statute of Frauds. And in the case wherein this was held, the rule was also laid down in strong and clear terms, that it is the crime and not the punishment which makes a man infamous, and vitiates his testimony. (*f*)

If a man be sentenced to the pillory for a treasonable libel, or slanderous words on government, he is not rendered incapable of becoming a witness in court, and is therefore a credible witness to a will: but if he be convicted of barratry, (*g*) which is an *infamous offence*, though he be sentenced only to be *fined*, he is rendered incompetent as a witness in court, and unqualified, it is conceived, as a *credible* witness, to attest under the statute. (*h*) Ideots and madmen, and children under the age of common knowledge, who are incapable of discerning or estimating truth, are clearly in a state of legal incompetency to prove a fact, and therefore can never be regarded as capable of attesting a will, so as to answer what the statute intends by such

(*d*) Co. Lit. 6 b.

(*e*) By stat. 31 Geo. 3. c. 35. it is enacted, that no person shall be an incompetent witness by reason of a conviction of petit larceny.

(*f*) Pendock *v.* Mackinder, Willes, 665. 2 Wils. 182. And see Rex *v.* Ford, 2 Salk. 690. 5 Mod. 15.

(*g*) The offence of stirring up suits and quarrels among his Majesty's subjects.

(*h*) Charter *v.* Hawkins, 3 Lev. 426. Rex *v.* Ford, 2 Salk. 690.

attestation. And generally, it may safely be concluded, that whatever incapacitates a man as a witness at common law is an objection to the sufficiency of his attestation as a credible witness within the meaning of the statute; for '*credible*,' in the place in which it stands in this statute, cannot well be received in any other sense than '*competent*;' the word '*credible*' in its popular sense being incapable of any constant test or standard, according to which a testator could make his choice of witnesses with any confidence in the validity of their attestation.

The word '*credible*' as it is used by the statute must be understood in the sense of competent.

Upon the same principle, if the competency, after being lost, has been restored before the attestation, the credit required by the statute has also been re-established, and the attestation will be good. Thus, the King's pardon, after a conviction of perjury, or other offence at common law, qualifies the party to attest a will, though, as it should seem, it would be otherwise in the case of a conviction of perjury, on the statute of 5 Eliz. c. 9. (1) And such restoration to competency would come too late, between the time of attestation and examination in court. (2)

Of the qualification of the attesting witnesses in the civil law.

(1) If a man be convicted of perjury upon the statute, he cannot be restored to credit by the King's pardon; for by the statute it is part of the judgment that the convict be infamous, and lose the credit of his testimony: nothing therefore but a reversal of the judgment or a statute pardon will, in that case, suffice to restore the competency. Rex *v.* Crosby, 2 Salk. 689, and Rex *v.* Ford, *ib.* 690. 3 Salk. 155.

(2) By the laws of the empire those persons only were capable of attesting a will who were themselves legally capable of making a will. No persons under puberty, or insane, or mute, or deaf, or prodigal interdicted the use of his own property, nor such as the law had judged reprobate or infamous, or had rendered intestable, could be admitted as witnesses to a will. I. 2. 10. 6. D. 28. 1. 20. Neither could women be witnesses to regular or perfect wills: the law admitting them in all matters, whether civil or criminal, when the nature of the case was such that other evidence could not be obtained; but not when there was a choice of testimony, as in making wills, and solemnizing other public acts. Their testimony was admitted in proof of

By the law of Rome no *hæres scriptus* or appointed heir could be admitted a witness to the testament by which he was so appointed; nor could the testimony of any one who was in subjection to such heir, or of his father, to whom he himself was in subjection, or of his brothers, if they were under the power of the same father, be admitted: but the testimony of legataries, and of those who were allied to them, or in subjection to them, was admissible; (*i*) which was a doctrine not perfectly agreeable to the *general rule* of the civil law,

(*i*) I. 2. 10. 10. 11.

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a fact, but not to give validity to a solemn instrument. See this particularity of the civil law explained, and the whole of this title of the Institutes '*qui testes esse possunt*' well commented upon by Vinnius, edit. Hein. 297.

The witnesses by the civil law must be credible, and idoneous, *at the time* of the will's being made; and according to the humanity of that system, as well as of our own, every one was presumed to be fit as a witness, unless the contrary were made to appear. D. 22. 5. 2. It is to be observed too, that *all* the witnesses ought to be fit, or *idoneous*, for the whole will was rendered null and void by the insufficiency of *any one* of the witnesses, (C. 6. 23. 12.) unless a codicillary clause were added, that if it were not valid as a will, it should be valid as a codicil.

If a madman attested in a lucid interval, his attestation was good; and so was that of a prodigal, if, before attesting, he had returned *ad bonos mores*. The integrity and freedom of the witnesses were great points in the Imperial law, insomuch that no person could be a witness to a testament, who was under the power of the testator; and though any number of persons might be admitted witnesses out of the same family to a will in which the family was not interested, yet if a son of a family gave away his military estate or *peculium*, after leaving the army, neither the father, nor any one under the power of the father, could be a witness to the testament. In excuse for which rules of exclusion the extent of the paternal authority among the Romans should be remembered; and, indeed, so adjusted to one another do the several parts of the system of the Roman jurisprudence appear to be, that the student will have considered them with little advantage in a view to the illustration of such of our own laws as have been copied from them or are in affinity with them, unless he has found time and possessed curiosity to make that great work of human policy a distinct and specific branch of his studies.

that no one should be permitted to give testimony in his own cause. (*k*) Nor is the consistency of that rule saved by the reason given for the admission of such testimony, *viz.* that legataries were particular and not universal successors, and that a testament might be valid without them; whereas the appointment of an heir was of the essence and constitution of a perfect testament, (3) and formed the principal feature of distinction between that and a codicil, (4) or a *donatio causa mortis*.

Of the rule of the spiritual and common law courts, where the witness was a legatee or devisee.

In the spiritual courts of this kingdom, to which the sole cognizance of the validity of wills belongs, where they relate to personal estate, the rule always was, that no legatee could give his testimony *in foro contradictorio*, in support of the validity of the will, till he had released his legacy or received the value thereof;

(*k*) Cod. 4. 20. 10.

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(3) The most exact definition of a Roman testament has been thought to be this—*the appointment of an executor or testamentary heir, made according to the formalities prescribed by law.* Domat. Lib. i. t. 1. sect. 1. and see D. 28. 5. 1.

(4) There is no difference in our law, *as to publication*, between codicils and wills; but codicils are said by Justinian, *nullam solemnitatem* ordinationis *desiderare:* which Vinnius comments upon with disapprobation, as not being consonant to the Theodosian Code; and complains of the *jejuna quorundam distinctio inter solemnitatem ordinationis et probationis.* Heineccius, however, maintains the distinction thus:—*In testamentis condendis testibus opus erat talibus quibuscum olim fuerat testamenti factio in comitiis calatis, quia jure vetustissimo lex erat populi suffragiis perlata, jure novo solemnis mancipiatio hæreditatis. Omnia ergo hic solemnia. At codicilli erant epistolæ. Quis epistolis testes adhibet? quis in iis solemnitatem requirit? valebat hujusmodi epistola, etiam non obsignata, dum de ejus fide constaret: quia enixæ voluntatis preces ad omnem successionis speciem porrectæ videbantur. Testes ergo adhibebantur ab iis, qui nuncupative fidei committebant. Postea autem in scriptis codicillis intestatorum testium opus erat præsentia per L.* 1. *C. Theod. De Test. et Codicill. non solemnitatis causa, sed ut testantium successiones sine aliqua captione serventur. Ergo non solemnitatis causa adhibendi, sed probationis causa. Nec aliud voluit Theodosius dum in omnibus codicillis testes requisivit. Vin. Com. lib.* ii. *tit.* 25.

and in case of payment, the executor of the supposed will was called upon to release all title to any future claim upon such legatee, who might otherwise be obliged to refund if the will were set aside. (5) The same rule prevailed at common law with respect to the inadmissibility of the testimony of a devisee or person benefited under a will of real estate, to establish its validity; and it appears from the case of Anstey *v.* Dowsing, (*l*) that if a legatee, who was a witness to a will, refused either to renounce or to receive a sum of money in lieu of his legacy, he could not be compelled by law to devest himself of his interest; and while his interest continued, his testimony was inadmissible.

J. T., after the statute of Frauds, made his will, by which he disposed of his real estate; and gave to one J. H. and his wife 10*l.* each for mourning, with an annuity of 20*l.* to E. H., the wife of J. H. The will was attested as the statute directs, by three witnesses, whereof J. H. was one. The legacies, and satisfaction for the annuity, were tendered and refused; and the question upon the special verdict was, whether or not the will was well attested according to the said statute. The judges of the King's Bench were unanimously of opinion, that a right to devise lands depended upon the powers given by the statutes, the particulars of which were, that a will of lands should be in writing, signed and attested by three *credible* witnesses in the presence of the devisor: that these were checks to prevent men from being imposed upon; and certainly meant that the witnesses to a will (who are required to be *credible*) should not be per-

(*l*) Vide Harris, Inst. Just. Lib. ii. tit. 10. s. 11.

(5) In the late case of Lees *v.* Summersgill, 17 Ves. Jun. 508. the statute 25 Geo. 2. c. 6., which has made such release unnecessary by making void the legacy given to the subscribing witness, was adjudged to extend to wills of personal estate, where such wills were attested, though unnecessarily, by a legatee.

sons entitled to any benefit under that will. And that, therefore, J. H. was not a good witness. (*m*)

It seems also, that the question was started in this case, whether a benefit to a witness at the time of his attestation should annul his testimony, though at or after the testator's death he should become disinterested by a release of his legacy, or the receipt of the value thereof; and that it was held that the condition of the witness *at the time of his attestation* must be regarded; and that, if interested *then*, he was not a good witness under the statute. The doubts and objections agitated in this and in other cases (*n*) occasioned the stat. 25 G. 2. c. 6. (*o*) to be passed, whereby the contests concerning the force and obligation of the word '*credible*' in respect to the attestation of persons benefited under the will were finally composed.

Of the opposition in sentiment between Lords Mansfield and Camden, on the import and exigency of the word '*credible*' in the statute.

The inquisitive student, however, will still recur to the perusal of Lord Manfield's (*p*) and Lord Camden's arguments (*q*) on the opposite sides of the question, concerning the import and exigency of the words '*credible witnesses*,' used by the statute. He will find Lord Mansfield strenuously of opinion, that though a witness might be entitled to a benefit under a will at the time of the attestation, yet if he became disinterested *before his examination*, his testimony was restored, and the will was supported by his attestation. In his Lordship's opinion, the word '*credible*' could have no meaning beyond '*competent*,' without leading to great absurdities; and in this *general* exposition of the word, Lord Camden coincided. But their difference was this,—Lord Mansfield would understand '*competency*' to imply nothing more than what was *tacitly contained in the word witness by itself*, (no man being a witness unless

(*m*) Str. 1254.

(*n*) Hilliard *v.* Jennings, Com. Rep. 91., and 7 Bac. Abr. edit. Gwillim, 329. Price *v.* Lloyd, 1 Ves. 503. 2 Ves. 374.

(*o*) See this statute in the Appendix.

(*p*) Wyndham *v.* Chetwynd, 1 Burr. 414.

(*q*) Hindon *v.* Kersey, 4 Burn. Eccl. Law, 97.

he is competent to give his testimony,) so that it appeared to his Lordship that the competency was to be seen and adjudged of *at the time, and with reference to the time of examination in court.* Whereas according to Lord Camden the *credibility,* i. e. *competency,* must be regarded as it stood at the time of the attestation. By Lord Mansfield's explanation of the force of the word *credible,* it became inoperative, and, thus, his Lordship reduced himself to the necessity of supporting his argument by supposing the word '*credible*' to have slipped in through the inadvertency of the framers of the statute, which he denied to be the production of Lord Hale, any further than, perhaps, as being compiled from some of his loose notes unskilfully digested.

His Lordship adverted to the rule of testimony in the ecclesiastical courts, and at the common law, where a release payment or tender made the testimony of a witness good. Nice objections of a remote interest, which could not be paid or released, though they hold in other cases, were not enough to disqualify a witness in the case of a will. Thus parishioners, he said, might prove a devise to the poor of the parish for ever. Interest was no positive disability; it only afforded a *presumption of bias,* and on that ground rendered a witness incompetent: but still, it was *only presumption,* and presumptions only stood till the contrary was made apparent; if the bias were removed, the presumption ceased. That nothing could be more reasonable than to allow this objection of interest to be purged *by matter subsequent to the attestation,* and previous to the trial.

Lord Camden, on the other hand, in the case of Hindon *v.* Kersey, argued that the word '*credible*' imported a *necessary* and *substantial* qualification of a witness *at the time of his attestation.* And that if the witness was incompetent *at that time,* nothing *ex post facto* could restore the validity of his attestation; neither could such devisee, or person taking a benefit under the will, be received as a witness for other devisees under

the same will: the objection was irremovable; and the *whole* instrument, as far as it concerned real property, was void.

He was of opinion, that the novelty introduced by the statute was the *attestation*, the method of *proving* which was left standing upon the old common law principles; as that one witness might prove what all the three had attested; and, though that witness must be a subscriber, yet that was owing to the general common law rule, that the best evidence must be produced. He considered, therefore, that the statute had principally in view the *quality* of the witnesses *at the time of the attestation*. That a will was the only instrument which required to be attested by subscribing witnesses at the time of execution; while leases, marriage agreements, declarations, and assignments of trusts, were only required to be in writing and signed. Those were all *transactions of health*, and protected by valuable considerations and antecedent treaties. The power of a court of equity was thought sufficient to meet every fraud that could be practised in those cases: but a will was often executed suddenly in a last sickness, and sometimes in the article of death. And the great question to be asked in such case was this,—Was the testator in his senses when he made the will? (*r*) And consequently the time of the execution was the critical minute which required guard and protection. An act so solemn, and often calling for a laborious recollection and investigation, executed at such a time, was pregnant with suspicion. What then, his Lordship said, was the employment of the witnesses? It was to inspect and judge of the testator's sanity before they attested; and if he was not capable, they ought to refuse to attest. In other cases, the witnesses were *passive;* here they were *active*, and in truth the principal parties to the transaction. THE TESTATOR WAS INTRUSTED TO THEIR CARE.

The design of the statute was to prevent wills from

(*r*) See Doe on dem. Walker v. Stephenson, 3 Esp. N. P. Ca. 284.

being made, which ought not to have been made, and *always operates silently by intestacy*. It is true, continued the Chief Justice, the design of the statute was to prevent fraud; and though no suspicion of fraud appeared in the case before him, *yet the statute had prescribed a certain method*, which every one ought to pursue to prevent fraud. (s) As to the minuteness of the interest, as there was no positive law which was able to define the quantity of interest which should have no influence upon men's minds, it was better to leave the rule inflexible than to permit it to be bent by the discretion of the judge.

Both these cases came before the respective judges, after the statute 25 Geo. 2. c. 6. had passed; and that of Wyndham *v.* Chetwynd appears to have fallen precisely within the second clause of that statute, the subscribing witness being a creditor, and the will having charged the debts upon the land. Probably, however, the suit had commenced in Chancery before the 6th of May, 1751; and so came within the eighth section of the same statute, which left the cases, which were in litigation before that time, to be adjudged and determined as if that statute had never been made.

The case of Doe dem. Hindon *v.* Kersey, in which the devise being to trustees to dispose of the rents to the poor of a township, the subscribing witnesses were interested as possessing property rated to the poor in that township, was clearly not within the statute 25 Geo. 2. c. 6.

It will occur to the attentive reader, however, that, although Lord Mansfield was supported by all his brothers, and Lord Camden was over-ruled by those who sat with him, the Legislature shewed their sense of the subject to agree with the policy and principles of Lord Camden's reasoning, by extinguishing the interest of the subscribing witness, where he took an interest as

(s) Vid. in Lea *v.* Libb, Carth. 37. the words of the Court.

devisee or legatee, *at the moment of the attestation.* (q) By this provision of the last-mentioned act the Legislature has expounded the intention of the first; and still in their alteration of the law, regarding the time of the attestation as the particular juncture to which the qualification related, they have made the interest of the individual a sacrifice to the will. (r)

An executor not taking any beneficial interest under a will, is a good witness; (s) and before the statute a legatee was a good subscribing witness where he took the same legacy by a former will, for then it was indifferent to him which prevailed. (t)

SECT. V.

Time and Manner of making the Attestation.

It is enough if the testator *might* see the witnesses, whether he *did* actually see them or not.

UPON a feigned issue, tried in the Court of Common Pleas, the question was, whether the will was made according to the statute of Frauds? for the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. The court said, the statute required attesting in his presence, to prevent obtruding another will in the place of the true one. It is enough if the testator *might* see, it is not necessary that he *should actually see them* signing; for at that rate, if a man should turn his back, or look off, it would vitiate the will. Here the signing was in the view of the testator; he

(q) 25 Geo. 2. c. 6.
(r) Brograve v. Winder, 2 Ves. Jun. 636.
(s) Phipps v. Pitcher, 6 Taunt. 220.
(t) Lord Ailesbury's case, 1 Burr. 427.

might have seen it, and that is enough. And they compared it to the case where the testator lay sick in bed, with the curtain drawn, (*u*) while the witnesses subscribed.

On a trial at bar, where the question was, whether the witnesses to a will had pursued the directions of the statute of Frauds, in the manner of subscribing their names, it was resolved, that where the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their names at a table in the middle of the room, and opposite to the door, and both that, and the door of the room where the testator lay, were open, so that he *might* see them subscribe their names if he would, though there was no positive proof that he *did* see them subscribe their names, there was a sufficient subscribing within the meaning of the statute; because *it was possible* that the testator *might* see them subscribe: and the court held, that if the witnesses subscribed their names in the same room where the testator lay, though the curtains of the bed were drawn close, it was a good subscribing within this (*x*) statute. (1)

(*u*) Shires *v.* Glascock, 2 Salk. 688.
(*x*) Davy and Nicholas *v.* Smith, 3 Salk. 395.

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(1) The notion of the civil lawyers was more rigid and cautious in this respect. The attestation ought to be *in conspectu testatoris;* and further, *non est satis, ut quidam tradiderunt, testes oculatos esse, si testatorem ipsi non videant, forte velo, aut cortina interjecta conspectum adimente, licet vocem ejus audiant: sed necesse est ut faciem ejus videant, ne qua fraus fiat, alio forte subornato, qui vocem testatoris imitando simulet. Vinn. Com.* 1. *lib.* 2. *tit.* 10. And Vinnius was of opinion, that a *blind man* (de quo nihil traditum est) could not be a witness because he could not satisfy the law, which required that the testator should be seen by the witnesses, and that they should be able to recognize the testator's signature. The English law, however, is clearly otherwise in this respect, by which an acknowledgment of the signing is held sufficient, as appears above; and it has been adjudged, that it is not necessary to the execution by a blind man that the will should be read over to him in the presence of the subscribing witnesses. Longchamp *v.* Fish, 2 N. R. 415.

A similar doctrine was maintained by Lord Thurlow in the Court of Chancery, in a case circumstanced as follows: (*y*) Honora Jenkins having a power, though covert, to make a writing in the nature of a will, ordered the will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her. After having seen the execution, they returned into the office to attest it; and the carriage was put back to the window of the office, through which, it was sworn by a person in the carriage, that the testatrix might see what passed. Immediately after the attestation, the witness took the will to her, which she folded up and put into her pocket. The Lord Chancellor thought the will well executed, and the above-mentioned case of Shires and Glascock was relied upon as an authority. Mr. Arden pressed for an issue: but, finding the Lord Chancellor's opinion very decidedly against him, he declined it.

In Broderick *v.* Broderick, (*z*) where the testator devised lands to J. S. and his heirs, and duly subscribed his will in the presence of three witnesses, who went down stairs into another room, and attested the will there, which was *out of the presence of the testator*, the relief afforded to the heir against a release obtained from him by the devisee, under a false assurance that the will was sufficiently executed, was a necessary consequence of the opinion of the Chancellor, (*a*) that the devise was void for want of an execution conformable to the statute. It was in vain contended for the devisee that the will, as to the devisor, was *executed*; and that the form of subscribing in the presence of the testator was only directed by the statute of Frauds, to prevent a rash disinherison of the heir: that since the execution of the will was fully proved, though the circumstances required by the statute had not been

(*y*) Casson *v.* Dade, 1 Bro. C. C. 99.
(*z*) 1 P. Wms. 239.
(*a*) Lord Harcourt.

observed, it appeared to have been the plain intention of the testator that the devisee should have the estate; and that the devisee having the legal estate, it would be hard to take it from him in equity, and by those means to dispose of the estate against the intent of the testator from the devisee, for want of a ceremony, when the *end* of that ceremony was answered, by its being made to appear, undoubtedly, that the testator did sign and seal this will.

Nor will the subscription of the witnesses in the *same room* always satisfy the statute; or necessarily imply it to be in the testator's presence; for, as was observed by Lord Chancellor Macclesfield, in Longford *v.* Eyre, (*b*) it might be done in a corner of the room in a clandestine and fraudulent way, and then it would not be a subscribing in the testator's presence. But his Lordship further said, that as it was sworn by the witness that he subscribed the will at the testator's request, and in the same room, that could not be fraudulent, and was well enough.

In a late case, (*c*) in the King's Bench, it was laid down by the Chief Justice, that it was not necessary that the devisor should actually see the witnesses subscribe; as in favour of attestation it was to be presumed, that if the testator might see he did see. But his Lordship added, that if we get beyond the rule which requires that the witnesses should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence, as to which the rule is, that when the devisor cannot, by possibility, see the act doing, it is done out of his presence.

Thus, therefore, the law upon this subject seems sufficiently settled upon this distinction, that if the attesting witnesses subscribe the will in such a situation with respect to the testator, as that it was not possible for him

(*b*) 1 P. Wms. 740.

(*c*) Doe, lessee of Wright, *v.* Manifold, 1 Maule and Selwyn, 294.

to have seen the act done by them, such will is void as to real estate for the defect of solemnity in its execution: but if their situation was such as to afford the testator the opportunity of seeing them subscribe, if he chose, their attestation under such circumstances will be good and valid, although in point of fact they may not have been seen by the testator in the very act of subscribing their names.

It is not enough that the testator is corporally present, he must possess his faculties so as to have a mental knowledge of the fact.

The mere corporal presence, however, of the testator, unless his mind and faculties also are present, will not satisfy the statute on this point: there must be a mental knowledge of the fact, for, as a subscription clandestinely made in a corner of the same room with the testator, was not, on this account, a sufficient attestation, so neither would such subscription in the same room suffice, if the percipience and intelligence of the testator were gone so as to constitute it an act done without his knowledge. On this principle was founded the decision of Right *v.* Price, (*d*) in which case the form of an attestation was written on the second sheet, and the witnesses put their names to it in the room where the testator lay; but he was in a state of insensibility: and the question was, whether this will was duly executed for passing lands according to the statute of Frauds?

In support of the will it was argued, that insensibility was something short of death; and if the testator was alive, it could not be said that the will was not attested in his presence: that the question was, whether the testator, having done all that was necessary on his part, and the attestation having been made according to the words of the statute, a fair transaction should be set aside, because a formality required, according to an implied intention of the Legislature, had not been complied with: that it did not appear but that the testator might, by possibility, have opened his eyes, while the witnesses were subscribing their names; which,

(*d*) Doug. 241.

according to the law as laid down in Shires and Glascock, would have been sufficient.

But the court said, that they would lean in support of a fair will, and not defeat it for a slip in form, where the *meaning* of the statute had been complied with; this was the principle of Shires and Glascock's case, and other cases of that sort. But the case then before the court was not one where there was a measuring cast and room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent as to all mental qualities. That it was usual in precedents of wills to say, that the witnesses subscribed at the request of the testator; that indeed was not expressly required by the statute: but the practice shewed the general understanding, and that the nature of the thing implied a request. The attestation in the testator's presence was as essential as his signature, and all must be done while he was in a capacity to dispose of his property. In this case, the testator could not know whether the will that he had begun to sign was that which the witnesses attested; he was dead to all purposes or power of conveying his property.

Whether an acknowledgment by the subscribing witness to the testator would be sufficient.

It seems not to have been judicially decided, whether an acknowledgment by a subscribing witness to the testator of his handwriting to the attestation would be sufficient. In the case of Risley *v.* Temple, (*e*) the facts were, that the testator lying sick in bed made his will, and signed, sealed, and published it, in the presence of three witnesses; but, being tired, ordered them to go and subscribe it in another room. They went into another room, out of the presence and sight of the testator, and subscribed their names; and then returned and owned their names to the testator, who looked upon the will, and said, '*they have done well.*' But this point was not spoken to in the case according to the report.

(*e*) Skin. 107.

It is very plain, however, that to hold such an acknowledgment sufficient, would be in direct opposition to the words of the statute, which, though it does not by the fifth section require the *signature of the testator himself* to be in the presence of the witnesses, does yet expressly direct the *subscription of the witnesses* to be in the testator's presence. And it seems little to be doubted but that, agreeably to the greater regard for the words of the statute, which now seems to prevail in our courts of justice, such an acknowledgment by a subscribing witness, of his handwriting to the attestation, made to the testator, after making the subscription out of his sight and presence, would be deemed an insufficient compliance with the statute.

The witnesses may subscribe at different times.

It has been shewn that a testator may *write*, and we shall now make it appear from the authorities, that he may *publish* his will at different times, or, in other words, that an attestation made by the witnesses respectively at three different times, if in the presence of the testator, satisfies the law.(2) The two leading cases to establish

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(2) It may be interesting to compare our own with the civil law upon this article. In an early period of the Roman jurisprudence, it was held, that a testament ought to be made *uno contextu*, without any foreign act intervening; and the witnesses were likewise required to attest, without separating, or even discontinuing the act of subscribing, till all was complete. And, indeed, it does not seem that the witnesses were ever released from the necessity of subscribing at one time, and in each other's presence. In favour, however, of certain unavoidable interruptions, the Emperor Justinian limited and explained the generality with which the rule had been expressed. In the Sixth Book of the code, tit. 23. 28. the qualification of the doctrine is thus propounded: *cum antiquitas testamenta fieri voluerit nullo actu interveniente, et hujusmodi verborum compositio non rite interpretata pene in perniciem, et testantium et testamentorum processeret: sancimus in tempore quo testamentum conditur, vel codicillus nascitur, vel ultima quædam dispositio secundum pristinam observationem celebratur (nihil enim ex ea penitus immutandum esse censemus,) ea quidem quæ minime necessaria sunt, nullo procedere modo, quippe causa subtilissima proposita, ea quæ superflua sunt minime debent intercedere. Si quid autem necessarium evenerit; et ipsum corpus*

this point are Cook *v.* Parsons,(*f*) and Jones *v.* Lake.(*g*) The first of which cases was decided upon a bill of review to reverse a decree of Lord Nottingham in 1682, for a sale of lands subjected by the will to the payment of debts. The lands were devised by the testator to trustees, and their heirs, to set and to farm let, and out of the rents (without saying profits) to pay his debts; and all his debts and legacies being first paid, he gave the surplus to F. S.

This will was written with the testator's own hand, as was proved, and was published in the presence of

(*f*) Prec. Ch. 185. (*g*) 2 Atk. 176.

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laborantis respiciens contigerit, id est, vel victus necessarii, vel potionis oblatio, vel medicaminis datio, vel impositio, quibus relictis ipsa sanitas testatoris periclitatur, vel si quis necessarius naturæ usus ad depositionem superflui ponderis immineat, vel testatori vel testibus, non esse ex hac causa testamentum subvertendum, licet morbus comitialis, (quod et factum esse comperimus) uni ex testibus contigerit: sed eo, quod urget et imminet, repleto, vel deposito, iterum solita per testamenti factionem adimpleri. Et si quidem a testatore aliquid fiat testibus paulisper separatis, cum coram his facere aliquid naturale testator erubescat, iterum introductis consequentia factionis testamenti procedere.

The phrase '*uno contextu*' is not to be understood as relating to the composition of the will, (which it seems might be taken up and prosecuted at intervals, according to the necessary interruptions of business, and as the leisure of the party allowed; as was said to be the law with us in Carleton *v.* Griffin, above cited) but to the mode of publishing and solemnizing the will, by the formal *nuncupatio testamenti*, or *declaratio voluntatis* to the witnesses, with the ceremonies of subscribing and sealing by them, and the signing by the testator, which ought all to be done at one time, that is to say, *uno* actus *contextu*, without the intervention of any act or business foreign to the purpose which the parties were met together upon, which, unless it happened on the natural and necessary occasions alluded to in the passage from the code above extracted, would vitiate the testament, as being inconsistent with the solemnity of its celebration. Thus Vinnius translates '*uno contextu*' into the Greek by μια ὑφη, and αδιαλειπτος, as being applicable not to the composition of the will, but to the publication of it; which is plainly the sense of it, as it stands accompanied in the text of the Institutes, "*et testes quidem eorumque præsentia, uno contextu, testamenti celebrandi gratia, &c.*"

three witnesses at three several times, and they all attested it in his presence: but he did not sign it in the presence of the second witness, but only owned the signing to be his hand, and desired him to attest the will, as was proved by that witness. The testator died, leaving an infant heir; and the land was decreed to be sold, and a day given the infant to shew cause against it. One of the objections to the decree was—that this was no good will within the statute of Frauds and Perjuries, because not attested by all the witnesses at *one* time, and that one of them did not see the testator sign, but only hear him own that it was his hand.

But the Lord Keeper held a publication of a will before three witnesses, *though at several times,* to be sufficient; and thought the writing of the will with the testator's own hand (3) a sufficient signing within the statute, though not subscribed nor sealed by him, but doubted whether acknowledging the subscription to be his own would suffice. (4)

In Jones *v.* Lake, the case upon the special verdict was thus; the testator signed and executed his will in December, 1735, in the presence of *two witnesses,* who attested the same in his presence; afterwards, in the year 1739, he with his pen went over his name, in the presence of a *third witness,* who subscribed his name *in the testator's presence,* and at his request: and the question was, whether this was a due execution within the statute. For the heir at law it was argued, that the statute requiring three witnesses to subscribe in the testator's presence must intend *they should be all present together;* otherwise, there was not that degree of evidence which the statute requires; for an attestation

(3) According to the Code 6. 23. 28. the writing of the will with the testator's own hand dispensed with his signing: but it was added as a condition, *et hoc specialiter in scriptura reposuerit, quod hoc sua manu confecit;* and it dispensed with no other solemnity.

(4) This question has been already discussed, and shewn to have been otherwise determined.

of three witnesses at different times *has only the weight of one witness.* Witnesses to a will not only attest the due execution of the will, but likewise the capacity of the testator at the time of execution. A man may be sane at the time *two* witnesses attest, and insane when the *third* attests. It cannot be considered as a will till the third witness has signed, for that completes the act. The will was dated in 1735. Suppose lands to be purchased after the date, and before the attestation by the third witness, would the lands pass? "Certainly not."

On the other hand, it was argued for the devisee, that a will executed before three witnesses, *though at three different times,* was good; the statute not requiring they should *all* be present at the *same* time. That the requisites under the statute were, that the testator should sign in the presence of three witnesses at least, and that they should attest in his presence. It would therefore be adding new requisites which the act did not mention, and in effect be making a new law.

The Lord Chief Justice Lee said, the case depended upon the words of the statute. The requisites in the statute were, that *three witnesses should attest his signing*: but it did not direct that three witnesses should be *all present at the same time.* Here, said the Chief Justice, you have the oath of three attesting witnesses. This is the degree of evidence required by the statute. And the same credit is given to three persons at different times, as at the same time. We cannot carry the requisites farther than the statute directs. The act is silent as to this particular: it would therefore be making a new requisite. The signing is the same act reiterated. The testator went over his name again, and declared it to be his last will. Judgment was accordingly given against the heir at law.

The judges, in the case of Ellis *v.* Smith,(*h*) admitted the authority of these cases, and drew from them an inference in favour of the validity of the testator's ac-

(*h*) 1 Ves. Jun. 11.

knowledgment to the witnesses of his handwriting to the signature of the will. "To strengthen the authorities I have already mentioned, said the Lord Chief Baron Parker, I shall take notice of the cases which allow the witnesses to subscribe at different times; and I think they support the admission of the declaration in question; since the testator is not supposed to run over his name before every witness, but having signed before one, to *acknowledge* it only before the rest. (5) The same conclusion was drawn by Lord Chancellor Hardwicke, Sir John Strange, Master of the Rolls, and Lord Chief Justice Willes; the last of whom observed that the authorities not in point supported the decree more strongly than those in point, for they allowed the attestation and subscription of the witnesses at different times to be good; and the testator is presumed to write his name only before one, and to acknowledge it to be his hand to the remaining two. And in the opinion of the Master of the Rolls, to permit the witnesses to attest at several times, was to admit the asseveration of the testator that it was his will, to be equivalent to signing it before the witnesses; to which Lord Hardwicke added, that he differed from those who thought that the cases which had been mentioned only supported the case before the Court, by consequential reasoning; he thought them directly in point.

It is to be observed, however, that these decisions, in the opinion of the whole Court, went too far, and opened the way to frauds; and particularly, the Chief Justice observed with great force, that "he had known one man swear that he did not see the testator sign, and the other two swear that he signed it before the three. So might one man swear, that when he attested the will, the testator was insane; another, that he was sane; and thus an inlet was given to great frauds and

(5) In Jones *v.* Lake, (the last case produced,) the testator did run over his name again: but the principle of the decision implied the sufficiency of an attestation made at three distinct times.

impositions. But when they attested it *simul et semel*, they were a check upon each other, and such frauds were prevented; (6) nay, said his Lordship, I think a *parol* disposition *before three* full as solemn an act as a will in writing, attested by three *separatim*." He admitted, however, that the decisions were the other way, and that the point was established.

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(6) This was certainly the doctrine of the civil law, from which the framers of the statute in question borrowed, in making this provision for preventing the forgery of wills. We have shewn that the words '*uno contextu*' related to the complex ceremony of publication, which was necessary to be done by a *continued* act. The attestation, therefore, which was an essential part of the publication, was necessary to be done by the witnesses, *simul et semel*, at the same time, at the same place, and in sight of each other; not meaning of course, by the *same* time, *eodem instanti*, but *uno actus contextu*, at one juncture, without break or interruption, as all solemn legal acts and ceremonies, according to the civil law, were required to be done, and as the text of the Code (6. 23. 21.) well explains it; distinguishing at the same time between the act of making and that of celebrating and publishing the will, to which last-mentioned act the words '*uno contextu*' are shewn to be alone applicable. *In omnibus autem testamentis quæ præsentibus vel absentibus testibus dictantur, superfluum est* uno eodemque tempore *exigere testatorem, et testes adhibere, et dictare suum arbitrium, et* finire testamentum; *sed licet alio tempore dictatum, scriptumve, proferatur testamentum, sufficiet uno* [*tempore*] *eodemque die, nullo actu* [*extraneo*] *interveniente, testes omnes, videlicet simul, nec diversis* [*temporibus*] *scribere, signareque testamentum. Finem autem testamenti subscriptiones, et signacula testium esse decernimus.* This exactness with respect to the simultaneous performance of the act of publication was retained out of the civil law, or *jus civile*, when the civil and prætorian law were reduced into agreement, as I have before shewn: for the efficacious form of a will, as ultimately established, was a tripartite constitution. The *necessity* of witnesses, and their *presence* at *one* and the *same* time, was founded on the *jus civile*—the *subscriptions* by the testator and the witnesses were enjoined by the Imperial constitutions,—the *sealing* and the *number* of the witnesses were settled by the edict of the Prætor.

SECTION VI.

Evidence of the Attestation.

IT has already been made to appear that a will of lands may be sufficiently established in a court of justice, as to the testator's signature, by proof of his acknowledgment thereof. It will be proper now to consider what is sufficient *proof* of the due *attestation* of such a will, according to the directions of the statute. We have seen that upon a question before the Court, whether or not it should be left to a jury to determine as to the fact of a due attestation in the presence of the testator, where all the witnesses were dead, it was clearly held, that such question was proper for the decision of a jury, who might found their verdict upon mere circumstances and probabilities. (*i*)

In the courts of common law, *one* of the subscribing witnesses may prove the attestation by the others.

In the courts of common law, where a will of lands is produced, it is usual to call but one witness to prove it: but that is said only to be the case where no objection is made on the part of the heir, who is entitled to have all the witnesses examined; yet in such case the heir himself must produce the other witnesses, for the devisee need produce only one, if that one can prove all that is requisite to establish the validity of the will. (*k*)

And if *all* the witnesses deny their signatures, still the devisee may go into circumstances to prove the due execution of the will.

He must prove that the testator signed in the presence of himself and the other witnesses, or that he acknowledged his signature to each of them, and that each of the witnesses subscribed in his presence. Where the witnesses have signed separately, as one can only prove his own act, they ought all to be called. If the two other witnesses be called by the heir, and refuse to

(*i*) Hands *v.* James, 2 Com. Rep. 530. Croft *v.* Pawlet, 2 Str. 1109. Bruce *v.* Smith, Willes 1.

(*k*) Gilb. Eject. s. 8. Holt's Rep. 742. Dayrell *v.* Glascock, Bull. N. P. 264. 1 Esp. N. P. Rep. 391.

verify their attestation, still the proof of their handwriting will be enough, if one of the three can prove the other circumstances of the execution. Indeed, it has been held, that if they *all* swear that the will was *not* duly executed, the devisee may yet go into circumstances to prove the due execution. (*l*) And if an attesting witness to a will impeach its validity on the ground of fraud, and accuse other subscribing witnesses who are dead of being accomplices in the fraud, it is competent to the person claiming under the will to give evidence of their general good character. (*m*)

Whether the evidence of the subscribing witnesses can be received against their own attestation.

It appears, and with the greatest reason, that the evidence of subscribing witnesses against their own attestation has always been received, if received, with the utmost reluctance; and the Courts have, on the other hand, been very ready to admit counter-testimony to establish the will against such suspicious and discordant depositions. In Lowe *v.* Jolliffe, (*n*) which was tried at bar, upon an issue of *devisavit vel non* out of Chancery, the three subscribing witnesses to the testator's will, and the two surviving witnesses to the codicil, and a dozen servants of the testator, all swore him to be utterly incapable of making a will, or of transacting any other business at the time of making his supposed will and codicil, or at any intermediate time. But this evidence was opposed by the depositions of several of the nobility and principal gentry of the county where the testator resided, who had frequently and familiarly conversed with him during the whole period, and some on the very day on which the will was made; and also of two eminent physicians who attended him, and who all swore to his entire sanity and more than ordinary intellectual vigour. (1)

(*l*) Pike *v.* Badmering, Str. 1096. (*m*) 1 Blackst. 365, 416.
(*n*) 3 Burr. 1244.; and see 6 East, 195.

(1) See some observations of Sir William Grant in Burrows *v.* Locke, 10 Ves. Jun. 474.

The counsel for the plaintiff also examined to the like purpose the attorney, a person of unblemished reputation, who drew the will; and read the deposition of the attorney, by whom the codicil was drawn and witnessed, (he being dead, and his testimony perpetuated in Chancery,) who spoke very circumstantially to the very sound understanding of the testator, and his prudent and cautious conduct in dictating the contents of his codicil. Upon the whole, it appeared to be a very black conspiracy to set aside the will, without any foundation whatsoever; the defendant's witnesses being so materially contradicted, and some of them so contradicting themselves, that the jury, after a trial of fifteen hours, brought in a verdict for the plaintiff, to establish the validity of the will and codicil, after an absence of five minutes. Lord Mansfield then declared himself fully persuaded that all the defendant's witnesses, except one, being nineteen in number, were grossly and wilfully perjured; and called for the subscribing witnesses, in order to commit them in court, but they had withdrawn themselves. A prosecution of some of them for perjury was strongly recommended by the Court; and the three testamentary witnesses were afterwards convicted, and sentenced each of them to be imprisoned for six months, to stand twice in the pillory with a paper on their heads denoting their crime, once at Westminster-Hall Gate, and once at Charing Cross, and to be transported for seven years.

It is observable that, although the testimony of these subscribing witnesses against their own attestation was *ultimately discredited*, no doubt was entertained of their competency; as was remarked by the late Lord Chief Justice Kenyon, in commenting upon this case in Bent *v.* Baker, (2) who entirely approved of Mr. Justice Buller's distinction in this respect between *negotiable* and *other* instruments. So that the observation of Mr.

(2) 3 T. R. 34.; and see the reasons for this distinction in Mr. J. Buller's opinion, pronounced by him in the same case.

Justice Yates, in the case of Alexander *v.* Clayton, (*o*) *viz.* that "the witnesses ought not to have been permitted to give evidence against their own attestation," seems to have been too strong for the present doctrine, or perhaps incorrectly stated by the Reporter.

It is one thing to offer testimony to destroy the validity of an instrument attested by one's own signature and subscription, and another to deny the *fact* of one's own attestation. Lowe *v.* Jolliffe, as above cited, is an example of the admissibility of the former species of testimony as well as of its liability to be impugned. And it is plain, upon principles, that a man ought to be admitted to deny what appears to be his own attestation; for to exclude him on the ground of inconsistency and contradiction, is to take for granted against him what is itself a primary object of proof. But it is equally clear that his denial may be discredited and overthrown by the counter testimony of the other witnesses, and that the will may be established against such a denial. Thus in the case of Alexander *v.* Clayton, mentioned above, Mr. Justice Yates observed that there were many cases where one of the witnesses had supported a will by swearing that the other two had attested, though they both denied it. And upon the same occasion it was said by Lord Mansfield, "that he had known several cases, both upon bonds and wills, where the attestation of witnesses had been supported by the evidence of the other witness against that of the attesting witnesses, who had denied their own attestation. It would be, added his Lordship, of terrible consequence if witnesses to wills were to be tampered with to deny their own attestation."

Of the doctrine laid down generally by Lord Mansfield, in Walton *v.* Shelley.

Thus, therefore, the law appears to be well settled and discriminated upon these important points of evidence; and it is to be observed, that the present consideration is confined to the case of subscribing witnesses; and that therefore there is nothing in what has been stated, or produced, which contradicts the

(*o*) 4 Burr. 2224.

maxim of law as it was recognised or decided upon in Walton and Others *v.* Shelley, (*p*) that *no man shall be suffered to give evidence to invalidate* HIS OWN *instrument;* nor does it seem that Lord Mansfield, in pronouncing his judgment in that case, laid down the rule with greater latitude than accords with the settled distinction, *as to the testimony of subscribing witnesses,* above adverted to. "What strikes me," said his Lordship, "is the rule of law founded upon public policy, which I take to be this—that no PARTY who has signed a *paper* or *deed* shall ever be permitted to give testimony to invalidate that instrument which he has signed." Now it is plain that a subscribing witness to a deed or will is in neither case, by force of such subscription, a PARTY to the instrument.

A distinction between the attestation of wills and deeds in respect to the point under consideration.

It is true, indeed, that the admission of a subscribing witness to a will to invalidate *that* instrument forms a stronger case than where such witness comes to destroy the validity of a *deed* which he has attested; since, in the latter instance, he attested only the execution, and not the intrinsic or general validity, of the instrument; but in the former, the testamentary capacity of the testator, as well as his formal execution, is verified by the subscription of the witness; not to mention also that such subscription is essential to the constitution and perfection of the instrument itself; so that in giving testimony against the validity of the will which he has attested, he comes to overthrow that which he himself was *actively* and *instrumentally* concerned in establishing.

And between *negotiable* instruments and *other* instruments.

It seems probable, therefore, that the consideration of these peculiarities, belonging to the attestation of wills, suggested to Lord Kenyon a foundation for the resemblance, which, in the case of Adams *v.* Lingard, (*q*) his Lordship appeared to think there existed between the case of an indorser of a bill and a subscribing witness to a will, as to the admissibility of their evidence to overthrow the instrument to which they

(*p*) 1 T. R. 296. (*q*) Peake's N. P. Cas. 117.

had given credit by their signature. In Adams *v.* Lingard, which was the case of an indorser of a bill, the late Chief Justice said that he wished the point to be settled in the House of Lords, being then of opinion, that the indorser was a witness proper to be heard, and other judges being of a contrary opinion. He then mentioned a case which was before Sir Joseph Jekyll many years before, and another which had been decided since, meaning that of Lowe *v.* Jolliffe above stated, wherein his Lordship said, it had been determined at a trial at bar that three subscribing witnesses to an instrument might be permitted to deny the validity of it.

But when the question came before the Court on a motion for a new trial (his Lordship, still adhering to his former opinion) it was said by Buller, J. that "the case before them was very different from that of witnesses to a will. The indorser had passed that *negotiable* instrument to the plaintiff as a good and valid security, and it would be attended with consequences most injurious to society if these securities might be cut down by the persons passing them; it was only for two men to conspire together to cheat all the world." It is remarkable, that in the much considered case of Bent *v.* Baker, which was determined three years before that of Adams *v.* Lingard, Lord Kenyon expressed his entire acquiescence in the distinction, as to this point, between negotiable instruments and deeds and wills.

Of the proof to establish a will of lands in courts of equity.

The reader has been shewn above, that the testimony of one of the three witnesses is enough to prove a will of lands in a court of common law. He will find the same rule of evidence laid down in early cases with respect to the mode of establishing a will in the courts of equity. Thus in the case of Longford *v.* Eyre (*r*) Lord Macclesfield makes the following observation:— "The proper way of examining a witness to prove a will as to lands, is, that the witness should not only prove the executing the will by the testator, and his

(*r*) 1 P. Wms. 741.

own subscribing it in the presence of the testator, but likewise that the rest of the witnesses subscribed their names in the presence of the testator; and then *one witness proves the full execution of the will,* since he proves that the testator executed it, and likewise that the three witnesses subscribed it in his presence."

The settled rule now is, that *all* the witnesses, if living, must be examined.

But in the case of Townsend *v.* Ives,(*s*) which came on about twenty-five years afterwards in the Court of Chancery, where the bill was preferred by the legatees, whose legacies were charged on the real estate, to have the will established, the rule was peremptorily laid down, that ALL the witnesses, if living, must be examined, to prove a will of lands. Thus also Lord Camden, in the above cited case of Hindon *v.* Kersey, in speaking first of the method of proof in a court of common law, says, "one witness is sufficient to prove what all the three have attested; and though that witness must be a *subscriber,* yet that is owing to the general common law rule, that where a witness has subscribed an instrument, he must always be produced, *because he is the best evidence.* This we see in common experience; for after the *first* witness has been examined, the will is always read." But the same judge, speaking afterwards of the course of the Court of Chancery in this respect, expresses himself thus:—"Sanity is the great fact which the witness has to speak to when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *vivâ voce* in Chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that Court never to establish a will unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of those whom the statute has placed about his ancestor. (*t*)

(*s*) 1 Wils. 1748.

(*t*) See Ogle *v.* Cook, 1 Ves. 177.;—all must be examined, or a reason given why any one is not. And see Harris *v.* Ingledew, 3 P. Wms. 92. But in Powell *v.* Cleaver, 2 Bro. C. C. 504., Lord Thur-

But if one of the witnesses be dead, a will may be read on proof of his handwriting, though this must be accompanied by positive and satisfactory proof, that he *is* dead. Thus in Bishop *v.* Burton, (*u*) the plaintiff being put to prove the will, the proof was of the hands of the devisor, and of two of the subscribing witnesses, who were proved to be dead; and as to J. B., the third subscribing witness, the witness deposed, that he was credibly informed in the country where he lived, and believed it to be true, that he died two years before, and believed his name subscribed was his proper handwriting. But the court was of opinion, that *that* was not sufficient proof to have the will read in evidence.

If one of the witnesses be *dead*, proof of his hand-writing may be read.

In Grayson *v.* Atkinson, (*x*) an objection was made for the defendant, that one of the witnesses being beyond sea, and the others not having sworn that the testator acknowledged his handwriting to the third, who was abroad, and there being no proof about him, the will could not be established: on the other side it was contended, that the same credit was to be given to his handwriting *as if dead.* But the Lord Chancellor Hardwicke doubted thereof, and said, "he did not know that it had been determined, that the same credit was to be given to the handwriting of a witness beyond sea, as if dead, because it was not necessary to presume the impossibility of getting at him, and he was apprehensive fraud might be used." (3)

Whether the hand-writing may be proved where a witness is beyond sea.

low said the practice had been so; but he doubted whether the rule had ever been laid down so largely.

(*u*) Comyns Rep. 614. (*x*) 1 Ves 459.

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(3) To obviate the inconvenience which may arise from the death of witnesses a bill may be filed in a court of equity to perpetuate the testimony, in which the complainant prays leave to examine the witnesses, to the end that their testimony may be preserved and perpetuated. The object of the bill is to preserve testimony for future litigation; and is properly brought when the party is in undisturbed possession, and where he has no present opportunity of proving the will against the heir at law.

In the case of Lord Carrington *v.* Payne, (*y*) however, a question was made, whether one of the witnesses to the will being abroad, in Jamaica, it was necessary to send out a commission to examine him. His handwriting was proved; and the other two witnesses were examined. Lord Alvanley, then the Master of the Rolls, held that it was not necessary to have his examination: but that *it was the same as if he were dead.* But his Honour seemed partly to found this resolution on the submission of the heir, who, he observed, did not make a point of it. He mentioned a case, however, where one of the witnesses being in India, it was held not necessary, but very dangerous, to send the original will abroad. And where, in another case before Lord Chancellor Thurlow, it appeared that one of the witnesses to the will was abroad, his Lordship said, (*z*) he doubted whether the rule had ever been laid down so largely as, that the will *could not* be proved, without examining *all* the witnesses, although the *practice* has been to examine all.

The hand-writing of a witness who since the subscription has become insane, may be proved.

This rule has been relaxed in other instances, where, to have rigidly adhered to it, would have imposed impossibilities upon persons coming into equity to establish these instruments. As, where a witness to a will of real estate had since become insane, proof of the handwriting of such witness was allowed. (*a*) And in a late case at the Rolls, proof even of the handwriting was dispensed with, in the case of an old will, which appeared by the date to have been made thirty years before, the testator having been dead above twenty years, and no account being to be obtained of one of the subscribing witnesses. The handwriting of two of the witnesses was proved: and his Honour observed, that he did not see how a will could be distinguished from a deed as to this point; only that the former, not having effect till the death, wanted a kind of authenti-

And in the case of an old will, where no account can be given of a witness, proof of the hand-writing may be dispensed with.

(*y*) 5 Ves. Jun. 411. (*z*) 2 Bro. C. C. 504.
(*a*) Bennett *v.* Taylor, 9 Ves. Jun. 381.

cation which the other had. That was from the nature of the subject. But he thought the proof sufficient in that case; for in a late case (4) in the Court of King's Bench, an inquiry of just the same kind was held sufficient; which excluded the question. In that case they had made all inquiry, and could hear nothing of the witness.

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(4) Cunliff *v.* Sefton, 2 East. 183., where, in an action upon a bond, evidence was offered that diligent enquiry had been made after one of the subscribing witnesses, at the places of residence of the obligor and obligee, and that no account could be obtained of such a person, who he was, where he lived, or of any circumstance relating to him, it was held sufficient to let in proof of the hand-writing of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff upon the record.

CHAP. IV.

OTHER BRANCHES OF THE SAME SUBJECT.

SECT. I.

Powers to be executed by Will.

Powers of appointment to be executed generally by will, without any directions as to the mode in which such will is to be executed, must be executed by a will attested according to the statute of Frauds.

WHERE a power is given or reserved by deed to be executed generally by a will, without any words expressing or importing the manner in which such will is to be executed, if the subject of such power is freehold estate, the power will be ill executed by any will not signed by the testator, and not attested by three witnesses, by the subscription of their names in his presence, with all the circumstances required by the statute of Frauds to give effect to a devise of lands. Lord Macclesfield, in Longford *v.* Eyre, (*a*) much doubted whether the will in that case would have been a good appointment, had it not been executed pursuant to the statute, because, said his Lordship, when a power is given to appoint the uses of land by deed or will, the will must be intended to be such a one as is proper for the disposition of land, and consequently should be subscribed by three witnesses, in the presence of the testator. For this is within all the inconveniences which the statute of Frauds was intended to prevent, and the words *in the nature of a will* mean the same as a will

(*a*) 1 P. Wms. 74.

which must therefore be subscribed by witnesses in the presence of the testator. And according to the same Chancellor, in Wagstaff *v.* Wagstaff, (*b*) if the *trust* of lands be limited to such persons as a man shall by will appoint, and the *cestui que trust* devise these lands by a will executed only by two witnesses, the will is void, and will not operate as an appointment. In confirmation of which, it was said by Sir John Strange, at the Rolls, in introducing his judgment in Jones *v.* Clough, (*c*) that "where the owner of an estate in land, *either in law or equity*, reserves to himself a power of disposing of it to such uses as he by will shall appoint, that must be by such a will as within the statute of Frauds would be proper for a devise of lands; otherwise the statute would be entirely evaded."

And the same doctrine holds in respect to *trust* estates.

But if the power extends over personal as well as real property, though a will made in execution of the whole power should fail as to the land for want of a sufficient attestation, it may nevertheless be a good execution of the power with respect to the personalty. Thus, where a man by his will had given several shares in the Sun Fire Office to his daughter, and after her decease to such persons as she should by her will direct, and had also devised real and personal estate in Jamaica in moieties, the one moiety to Frances for life, and after her decease to such person as she should by will direct, the other moiety to another person in like manner; and the daughter by her will reciting that of her father, disposed of the Sun Fire shares, and also by the same will devised the real estate, but the will was not duly executed to pass real estate, being attested by two witnesses only, Lord Chancellor Thurlow held that the will being sufficient to pass the personal estate, was so far a good execution of the power. (*d*)

But if such power extends to personal as well as real estate, and the will be unexecuted to pass *real*, it may nevertheless be effectual to pass personal estate.

It has been said that if an agreement be entered into, to charge certain lands with a sum of money for the

(*b*) 2 P. Wms. 258. (*c*) 2 Ves. 366.

(*d*) Duff *v.* Dalzell, 1 Bro. C. R. 147. and see Powell *v.* Beresford, 2 Lord Raym. 1282.

benefit of certain persons named, in such shares as a *third* person shall direct by his last will, such will need not be executed as the statute requires for passing real estate: but if one or more having the inheritance in them of certain lands, agree that *one of them* shall have power to charge the same with any sum by his last will, this power can only be well executed by a will with three witnesses. (*e*) This doctrine however seems very refined, and the case was one in which compassion may have had some effect.

If the owner of an estate reserves to himself, or gives to another, a power to appoint by will generally, the execution of the power must be by a will executed as the statute prescribes, with the regular attestation of three witnesses. (*f*) But if the subject of the disposition be personal only; then, although the power be required in terms to be exercised by will *duly executed*, such words will import no solemnity which the subject itself does not require; the words *duly executed* must refer to the nature of the act, and the nature of the thing which it is intended to pass by it. (*g*)

And although the subject of the power be real estate, yet when the power is given generally, without any specification or direction as to the instrument or mode by which it is to be executed, it has been doubted whether the execution of it by will must be made as the statute directs with respect to real estate.

In the case of Sayle *v.* Freeland and Others reported among the Chancery Cases in Ventris, (*h*) and referred to by Sir John Strange, in Jones *v.* Clough, (*i*) the bill was to redeem a mortgage made by the father of the defendant, or to be foreclosed. The defendants, by guardian, answered, stating that their grandfather was seised in fee, and made a settlement, whereby he entailed the estate, but with a power of revocation by any

(*e*) Jones *v.* Clough, 2 Ves. 365.
(*f*) 9 Mod. 485, by Lord Hardwicke.
(*g*) Poulson *v.* Wellington, 2 P. Wms. 533.
(*h*) 2 Vent. 350. (*i*) 2 Ves. 365

writing published under his hand and seal, in the presence of three witnesses; and the case was that he made his *will* under his hand and seal, wherein he recited his power, (2) and declared that he revoked the settlement; but the will had but two witnesses, who subscribed their names, though a third was actually present: the testator died, and the lands descended to the father, who made the mortgage; the defendants claimed by virtue of the entail. But the Chancellor decreed that the mortgage money should be paid; and, first, he said, there was an execution of the power *in strictness,* for the third witness was *present,* though he did not subscribe. But, secondly, if there had not been in strictness a good execution of the power, equity would help it in such a little circumstance, where the owner of the estate had fully declared his intention; further adding, that there was a difference where a man had power to make leases, &c. which would charge and incumber a third person's estate, which sort of powers were to have a rigid construction; but where the power was to dispose of a man's own estate, it was to have all imaginable favour. Here, we observe, that the power was to be exercised by a *writing,* and not necessarily by a *will,* executed in the presence of three witnesses; and although the party chose to execute the power by a writing in the form of a will, and that will not such a one as could have a testamentary operation under the statute of Frauds, yet it was not the less a writing published under hand and seal in the presence of witnesses. It has been clearly held by Lord Chief Justice Hale, (*k*) that if a power not requiring to be executed in that manner were to be executed by a bargain and sale, the

(*k*) Ingram *v.* Parker, Raym. 239.

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(2) That a power may be exercised without reciting it. See Molton *v.* Hutchinson, 1 Atk. 559. Robert *v.* Morgan, *ib.* 441. But see as to the question whether it will be executed by the general words of a will, Langham *v.* Nenney, 3 Ves. Jun. 467. Andrews *v.* Emmet, 2 Bro. C. C. 297. Croft *v.* Slee, 4 Ves. Jun. 60.

deed need not be enrolled. And it may be contended on grounds of analogy to that decision, that because the donee of a general power chooses to execute it by an instrument in the shape of a will, he does not oblige himself to make it agreeably to the forms required by the statute.

A man cannot by *will* reserve a power of disposing of real estate by a future unattested will or codicil.

Though a man by first passing the land by a sufficient conveyance may empower himself to make a future disposition thereof by a writing with one or two witnesses, and under such a power a will, or writing purporting to be a will, if attested according to the terms of the power, will be a good instrumentary execution of the power;(3) yet it has, upon very satisfactory reasons, been determined, that a person cannot by *will* enable himself to make any future disposition of land by any instrument whatever, not executed and attested as the statute of Frauds requires, in respect to wills of lands. If a will affects to reserve any power of disposition, such reservation is purely negative in its effect; it *does nothing;* unless perhaps it may serve as a positive expression of the non-effectiveness of the will itself as to certain subjects, or beyond certain limits. Such

(3) For in such a case the disposition is not testamentary in its origin, but is to be regarded as merely supplemental to, or as directing the operation of the conveyance from which the power springs. But whatever terms the creator of the power chooses to subject it to, they must in general be strictly complied with. This doctrine is well laid down in Hawkins *v.* Kemp, 3 East. 410. The terms of the power required that the revocation should be by deed or instrument in writing, executed in the presence of, and attested by three credible witnesses, and enrolled in one of his Majesty's courts of record at Westminster, and with the consent of H.'s wife, his father, father-in-law, and several trustees, being in all nine persons. The Chief Justice said that every one of these required circumstances, unessential and unimportant, except as they were required by the creators of the power, could only be satisfied by a strict and precise performance. They were incapable of substitution, because these requisitions had no spirit in them which could be otherwise satisfied. See Mansell *v.* Mansell, Wilm. 36. See also Digges's case, 1 Rep. 173. Bath and Montague's case, 3 Cha. Ca. 55. Kibbet *v.* Lee, Heb. 312. Thayer *v.* Thayer, Palm. 112. Ward *v.* Lenthall, 1 Sid. 143.

lands as a testator does not actually pass or dispose of by a present declaration of his mind, remain in him to be passed or disposed of by a future conveyance or will; but by such only as are competent in law, by the perfection of their respective executions, to the gift or transfer of the property, according to its nature and requisites. And this rule obtains equally in respect to legal and trust estates; for trust estates are as much within the statute of Frauds with regard to the formalities requisite to the perfection of a will, as legal estates, since the same mischiefs would follow from the omission in the one case as the other.

If an instrument be not intended to have effect till the death of the party, it is *testamentary* in its operation and quality, *whatever may be its form.*

It is established that an instrument, whatever is its form, whether it be a deed poll or indenture, is testamentary in its operation and quality, if it be intended not to operate till the death of the party who made it.(*l*) The circumstance, and not the form, must decide the character of the instrument. Thus, therefore, the deed in the case of Habergham *v.* Vincent(*m*) could have no other operation than as a testamentary paper; and presented itself, under this *general* character, in three distinct lights,—as a codicil,—as an exercise of the power reserved by the will,—or as an integral and original part of the will itself, by incorporation into its substance.

A codicil has a *distinct* commencement; and though it is said to be a part of the will, yet it becomes so by *first acting* upon the will, and in a manner drawing it down to the date of its own publication; and can have no operation upon *freehold* estate, either *as part* of the will, or *by its own efficiency*, unless it be attested as the statute directs.

Difference between a conveyance to uses and a will, in respect to the legality of reserving a power of future disposition.

As an exercise of a power of appointment, it is met by the rule that a testator cannot by his will reserve a right to devise freehold estate by a future testamentary instrument, not attested according to the statute of

(*l*) Moor, 177. 2 Leon. Part iv. 159, 166. Audley's case, Dyer, 166, *a.* Greene *v.* Proude, 1 Mod. 177.

(*m*) 204. And see Hamfield *v.* Habingham, 10 Ves. Jun. 281.

Frauds, however practicable this may be under the uses of a conveyance. Where there is a conveyance, and a power is reserved under the uses thereof, the estate is parted with, the land is gone, and the power, which is in truth only an executory use, being collateral to the land, may be limited to be executed by any instrument whatever; by a *deed* or writing, with or without witnesses: for its *specific* operation is not in question, where the terms of the conveyance reserving the power have defined the mode of its execution; though, as we have seen, if it be reserved to be executed by a will in general terms, the party will be understood to have intended a *proper* will, according to the statute. But by his *will* a man parts with nothing before his death, till which time his will is ambulatory, incomplete, and revocable: he has the same absolute dominion he had before; and if by any subsequent act he parts with any portion of his estate, whether it be a part of that already devised, or a part affected to be specially reserved for his future appointment, he parts with it *as owner*, and not *instrumentally*, and by virtue of an *original*, and not a *derivative* power.

Every paper to which a will, duly attested, refers, if it comprise a disposition of *real* property, to be effectual as a testamentary paper, must either be incorporated originally into the will, or be executed according to the statute; and such paper, to be so incorporated, must be distinctly referred to and described in such will.

As to the third point, the truth seems to be, that every paper to which a will refers must be incorporated *originally* into the will itself, if real property is to be affected by it; or it can avail nothing, unless it is itself executed according to the statute of Frauds. And further, the rule is, that an instrument properly attested, to incorporate into itself another instrument not attested, must describe it so as to manifest distinctly what the paper is that is meant to be incorporated, in such way as that the Court can be under no mistake. (*n*) It did not appear to the Court in Habergham *v.* Vincent, that the second instrument, although testamentary in its nature, could be incorporated into the will; which referred to nothing actually in existence, but to an intention merely; and it has been sufficiently shewn, that

(*n*) Smart *v.* Prujean, 6 Ves. Jun. 565.

the will could create no power with a special mode of execution. In that case Mr. Justice Wilson said that he believed it to be true, and he had found no case to the contrary, that if a testator in his will refers expressly to any paper *already written*, and has so described it that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, such paper makes part of the will, whether executed or not; and by such reference he does the same as if he had actually incorporated it, because words of relation have a stronger operation than any other. But the difference between that case and the reference to a future intention is striking: in the former, said the judge, there is a precise intention mentioned at the time of making the will, for the paper makes out the intention at the time; but when a man declares he will in some future paper do something, he says, he will make a will as far as his intention is then known to himself, but he will take time to consider what he will do in future. (*o*)

With respect, however, to the copyhold estate, which was a subject of the dispositions in the case of Habergham *v.* Vincent, it was held quite clear by the Chancellor and judges, upon the doctrine a little before stated, that as the deed poll was capable of being regarded as a testamentary paper, it was sufficient to pass the copyholds. And from the principles of the reasoning just produced, as a testamentary paper it must have operated as a *codicil;* for it could neither be incorporated into the will as an original part of it, nor operate by virtue of the power affected to be reserved by the will.

(*o*) See the case of Wilkinson *v.* Adam, 1 Ves. & Beames, 422.

SECT. II.

Wills charging Lands.

By a will duly executed, charging land *generally* with legacies, a testator enables himself to lay any number of *additional legacies* on the land, by a subsequent testamentary disposition *unexecuted.*

WE observe that in the above-mentioned case of Habergham *v.* Vincent, the counsel for the surviving trustee endeavoured to maintain the competency of the testator, by a will executed according to the statute, to reserve a power of future disposition of land by an instrument not perfected as the statute directs, by analogy to the case of a general charge of legacies on lands by a will duly executed; whereby it has been held, (*p*) that a testator enables himself to charge the land with any number of additional legacies, by a subsequent instrument not attested so as to pass lands. This, indeed, seems to be established doctrine with respect to legacies, which Lord Hardwicke said was attended with no greater inconvenience than arose from a man's charging his lands by will with the payment of his *debts*, which, doubtless, would extend to all the debts contracted during his life. It was insisted, however, that the statute was equally defeated by the privilege of charging land with legacies or debts to any extent by an unsolemn will, where the land has been generally charged by a previously attested will, as by a power of appointing reserved by a will; for, as to debts, it was said, that by a bond creating a voluntary debt, a testator might circuitously dispose of the whole value of his estate; so likewise, after having generally charged legacies upon his estate by an attested will, he might devise away the whole of his property by any testamentary paper, by creating a charge equal to its value.

(*p*) Masters *v.* Masters, 1 P. Wms. 423. and Brudenell *v.* Boughton, 2 Atk. 274.; and see the late case of Rose *v.* Cunningham, 12 Ves. Jun. 29.

In reply to this reasoning, it was said by the Lord Chancellor, "that it was supposed to be Sir Joseph Jekyll's opinion in Masters *v.* Masters, that it might be supported as a power reserved to the testator, to increase the charge by a future act. That could not be the ground of his opinion. There was a manifest incongruity in the supposition of a power reserved by a man's own will, which cannot begin to operate till all power in him ceases. The observation made by Mr. Justice Wilson was unanswerable, that it is not a personal privilege; and that no man can reserve a power to act against the forms which the law has imposed. Therefore, if it were to pass by a testamentary act, such act must have all the solemnities which the law has directed.

"But in a correct MS. note in his Lordship's possession, Lord Hardwicke had stated the ground of the determination to be the analogy to the case of debts. His Lordship added, that the cases to which he had alluded were none of them cases of a primary, substantive, independent charge upon the real estate, but a charge upon it in aid of the personal, which was *primarily* charged. Such a charge, whether for debts or legacies, was necessarily uncertain in extent, not merely because the testator could not ascertain what might be the amount of his future engagements, but because the amount of the personal estate was fluctuating.

"A charge for legacies, therefore, (his Lordship said,) must be uncertain as to its extent, not merely because the testator could not ascertain what might be the amount of his future engagements, but because the amount of the personal estate was fluctuating. Whatever affects the primary fund, varies the amount of the charge. Therefore, though given by a will duly executed, they are revocable by a will not so executed; for the charge upon the land was only for the deficiency of the personal to answer the legacies. If the legacies were taken away, the land would not be affected. If

they were increased, they would affect the real, by diminishing the personal, which it was in the power of the owner to do all his life. It was obvious, therefore, that the statute of Frauds did not affect the question as to legacies, because it did not prevent a man from creating by will a fluctuating charge upon real, in aid of personal property. But that, said his Lordship, could bear no application to a devise of the land itself, or a reserved part of the realty not disposed of; nor, as he conceived, to an original charge upon the land, which he should think could not be revoked by a second informal will. If ever such a case arose, it would be a new question."

A sum of money devised out of land is part of the land in equity, and such disposition is within the statute of Frauds.

From Brudenell *v.* Boughton,(*q*) so often referred to in the above-mentioned case of Habergham *v.* Vincent, we collect the following useful distinctions upon the subject. If a sum of money be given *originally* and *primarily* out of the land, such a devise requires as much the solemnities of execution prescribed by the statute, as a devise of the land itself; because the money is regarded in a court of equity as *part of* the land, since it can only be raised by sale or disposition of part of the land; and this is considered as analogous to the rule of law, that a devise of the rents and profits is a devise of the land itself. And if money be so charged upon land by a will with the due solemnities, a subsequent will unattested, or attested by one or two witnesses only, cannot revoke or subtract the charge. But where land is made subject to legacies generally, such legacies are nevertheless to be considered as primarily attaching upon the personal estate, so that if there are personal assets sufficient, the land will be exempt, for it is only a collateral security; and by a consequence in reasoning, if the will be revoked as to the personalty, the object of the collateral security is gone, and the land remains no longer charged. The legacies given by the first will may be withdrawn by a

(*q*) 2 Atk. 267. 1 Ves. and Beames, 446.

second unexecuted according to the statute; and by such second will other legacies may be substituted of a different amount; or, without changing or modifying the legacies first given, additional ones may be given either to the same or different persons. (*r*)

If money be directed to be laid out in land, the person to whom the *entire* interest in the land would belong under the will, if purchased, may, before the investiture, elect to take it either as money or land, *i. e.* as personal or real estate. If such devisee makes his will, and describes such interest as money, it will pass without attestation: (*s*) but without such indication of intention to treat it as money, it remains real; and the will, to pass it, must be attested. (*t*)

But the person to whom the land, if purchased, would belong, may act upon the fund as real or personal estate.

The great point to be attended to in considering the cases of general charge, is, that by the first will executed to pass and affect real property according to the requisitions of the statute, the land is effectually made an auxiliary and collateral fund to the personal property in respect of legacies; and that to this indefinite extent it becomes a pledge, and impressed with the character of personal estate. But it is to be observed, that if a *will* properly attested contains a direction to sell real estates, and out of the produce to pay legacies, such direction does not so stamp this character of personal estate upon the *whole*, or produce so complete and *ultimate* a conversion of the land into personalty, as that the surplus, after the legacies are satisfied, may pass by an unattested codicil. To produce this effect, the testator ought, in a will executed and attested so as to pass freehold estate, to manifest a clear intention to have the whole actually sold, or, at least, should in such will decidedly shew that he contemplates the surplus as personal estate, and intends to bring the *whole* within that description of property. To this limit the cases cited in Sheddon *v.* Goodrich (*u*) seem to have

A direction by will to sell lands for certain purposes, does not so ultimately change the character of the property as that the surplus, after the particular objects are satisfied, may pass by an unattested codicil.

To effect this absolute conversion, a clear intention ought to be demonstrated.

(*r*) *Vide* Hannis *v.* Packer, Ambl. 556.
(*s*) 3 P. Wms. 221. note (*c*).
(*t*) *Ibid* (*u*) 8 Ves. Jun. 481.

carried and confirmed the doctrine. What is not *absolutely* converted, either in law or equity, but is only directed to be sold to answer a particular purpose, as to pay legacies, for which the testator has directed certain conveyances to be made, retains, as to the surplus, its character of real estate: for the particular purpose to which the produce is destined the conversion into personal estate takes place, but as between the personal and real representatives it remains real.

If the object for which the conversion was to be made does not come into existence, and thus no reason arises for any conversion to answer the purposes of the will, the estate *descends,* in the view of a court of equity, *as real,* to the heir at law.

Such being the doctrine on this subject in a court of equity, it follows, that if after directing an estate to be sold for the payment of *particular* legacies, by a will duly executed and attested, a testator might, by an unattested codicil, dispose of the surplus of his property, either the consistency of the courts of equity, which to other purposes have considered such surplus as real, or the positive restrictions of the Legislature, would be violated.

If, therefore, an estate were directed to be sold, and all the debts and legacies generally to be paid out of the produce, it is clear that this would amount only to that sort of general charge which has been so much considered above; and, though pecuniary legacies generally given by an unattested codicil would, according to the above principles, attach as charges *secondarily* upon the land, yet the surplus could not *eo nomine* be disposed of by such unsolemn instrument.

Where a testator shews both the *real* and *personal* estate to be equally in his contemplation, as the funds out of which the legacies are to be satisfied, a revocation effectual as to the

But if a testator, by a will duly executed to pass lands, directs the whole of his *real* and *personal* estate to be sold, and out of the produce thereof certain legacies to be paid, and then by an unattested codicil in terms revokes his will, which revocation, from the want of solemnity, can only operate upon the previous dispositions of the personal estate, a very nice and curious

question may arise, whether the legacies are to be considered as gone by the partial failure of the fund, or as remaining charged on the real estate. In the above cited case of Sheddon *v.* Goodrich, this was one of the points, and one on which the present Chancellor expressed a painful degree of difficulty and doubt. The distinction stated by his Lordship appears to be in substance as follows :—

personalty, but insufficient as to the real, for want of being attested according to the statute, will leave the *land* still subject to the charge.

Where a testator, in general terms, subjects his real estate to his general legacies, or charges his legacies generally upon his real and personal property, inasmuch as the primary and direct source from which the legacies are to come will be the *personal* estate, (2) the

(2) The general rule is clear, that the personal estate is liable in the first instance to the payment of debts. But this general rule supposes, that the engagement upon which the debt arose was primarily a personal contract; in which case the personal estate, as having received the benefit, becomes the proper fund out of which the payment should be drawn; so that if money be borrowed, or a debt be any way incurred, and a mortgage made without bond or covenant accompanying it, yet the mortgage makes it no more than a specialty debt in equity, and the land comes only in aid of the personal obligation upon the simple contract.

The rule also supposes, that it was originally the personal contract of the testator himself; for if an equity of redemption has descended, and then the mortgage is transferred, and the heir covenants to pay the money, and dies; still as the mortgage was not originally his, the land, upon the second descent, must bear its own burthen; and notwithstanding such personal contract of the immediate heir, his personal assets will, upon his decease, be only *secondarily* liable.

The same doctrine holds if the equity of redemption comes by purchase instead of descent. As it was not originally the debt of the purchaser, his heir will not be entitled to be exonerated out of his personal assets; and the order of charge will not be varied, if the purchaser should covenant with the mortgagee, for still it was not primarily his own debt, and his personal contract is considered as being only auxiliary; nor if he covenants with his vendor to save him harmless from the mortgage; for still the purchaser of the equity of redemption is considered as having bought the estate, subject to the charge and with the burthen upon it, to which his covenant has relation as to its principal; and indeed he takes upon himself no more by such covenant than would have been without it laid upon him by a court of equity.

By the majority of the cases, it would appear, that when the debt

land being regarded in equity as only *secondarily* and *eventually* charged as a collateral security to the personal estate, if the principal fund is afterwards withdrawn, the rule of *accessorium sequitur principale* seems to apply; and as the land was charged only to help the deficiency of the personal, this latter fund being *withdrawn,* and not failing through *insufficiency,* the testator must be presumed in law to have altered his will as to the legacies. But where a testator shews an intention to bring the real and personal estates into one fund, by directing a sale of both, and the legacies to be paid out of the produce, he seems to have both funds *equally* in contemplation; and not as in the other case, (according to the construction the law puts upon the intention,) to mean primarily and originally a mere personal gift, to be assisted out of the real property, if the personal fails. The distinction runs into great subtilty:—but is there any distinction *less* subtle that will reconcile the authorities?

The Court cannot *see* the intention of the testator with

It seems that the effect of the statute of Frauds is to prevent the Court from *seeing* the intention of the tes-

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was originally the debt of the testator, his personal assets will not be exempted, except by declaration plain, or necessary implication, contained in, or arising from the will; and that mere parol or extrinsic evidence cannot be admitted in opposition to the above rule. It is agreed that a testator may, if he please, bequeath his personal estate, as against his heir or devisee, clear of debts: but it is left by the cases somewhat uncertain what mode of expression will suffice for this purpose. However, it is settled, that merely charging the real estate, or even creating a term for payment of debts, is not an exemption of the personal. The personal estate may be said to be first subject. 2. The estates devised for the payment of debts. 3. The estates descended; and this, though the estates are subject to a *general* charge for the payment of debts. 4. Real estates specifically devised, subject to and generally charged with the payment of debts. The Reader will find all the authorities on this subject in Mr. Coxe's note to Evelyn *v.* Evelyn, 2 P. Wms. 659, and the note of Mr. Sanders to Galton *v.* Hancock, 2 Atk. 438, to which may be added the cases of Hamilton *v.* Worley, 2 Ves. Jun. 62. Woods *v.* Huntingford, 3 Ves. Jun. 120. Buller *v.* Buller, 5 Ves. Jun. 517. Waring *v.* Ward, 5 Ves. Jun. 670. 7 Ves. Jun. 332.

tator to dispose of the real estate (3), if he has not done it with the solemnities enjoined by the statute; for in Sheddon *v.* Goodrich, the codicil declared an intention to make a new disposition of the real as well as the personal: but as it could only have the effect, for want of execution, of revoking the charge of the personal, the land was construed, notwithstanding the contrary intention expressed, to remain onerated, upon the principle of the distinction above stated, between the case where legacies are charged upon a mixed fund, and where they are wholly issuable out of the personal in the first place, the real estate being meant only to come in aid as a supplemental and secondary resource. And this a testator will be construed to mean, unless he plainly expresses or indicates a contrary intention. (*x*)

respect to his real property, unless he expresses it by a will executed according to the statute.

In the case of Buckeridge *v.* Ingram, (*y*) where a testator, by a will duly executed, gave an annuity to his daughter, charged on all his estates, both real and personal, and by codicil not attested, gave his real and personal estate to his mother for life, the personal estate only was held by this new disposition to be discharged from the annuity; or, in other words, the annuity was revoked as to the personal estate, but remained a charge upon the real; and the present Chancellor seems to have approved of that judgment; (*z*) who says that "Lord Alvanley, as he understood upon conversing with him, proceeded upon this, that it was not the case of a legacy given, as in Brudenell *v.* Boughton, and that legacy altered, modified, or extinguished by a sub-

(*x*) *Vide* Ancaster *v.* Mayer, 1 Bro. C. R. 454.
(*y*) 2 Ves. Jun. 652. (*z*) 8 Ves. Jun. 500.

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(3) Thus in Buckeridge *v.* Ingram, 2 Ves. Jun. 652. the Master of the Rolls (the late Lord Alvanley) observed, "that he *could not read the will* without the word 'real' in it: but he *could say*, for the statute enabled him, and he was bound to say, that if a man, by a will unattested, gives both real and personal estate, *he never meant to give the real at all.*" In Sheddon *v.* Goodrich, Lord Eldon noticed the accuracy with which Lord Alvanley expressed himself as to that point.

sequent testamentary paper, but a charge created upon two funds; and the testator, by a subsequent paper, withdrew, not the gift of the thing, but one of the funds, which by the former paper was made liable to the payment of that charge, still leaving a subsisting demand; for, being given out of the real as well as the personal estate, the gift out of the real remained, though that out of the personal was gone; not because the thing given was destroyed, but the fund out of which it was given." If the presumption of adding any thing to his Lordship's remarks on the point in Buckeridge *v.* Ingram may be excused, it might be suggested, that the *power of distress* accompanying the annuity in that case, seemed to mark the real property as an *original* fund in the testator's contemplation for producing the annuity.

Devise of a rent out of land must be by will, attested by three witnesses.

In the early case of Hyde *v.* Hyde, (*a*) which appears to have been the first case upon this subject, Lord Chancellor Cowper observed, that these legacies, charged upon land by an unattested codicil, were not devised *out* of the land like a rent, but were only secured by land, which before was well devised. And the same Chancellor clearly held, that a rent out of freehold would not pass but by a will attested by three witnesses. Mr. Justice Buller (*b*) put the case as to rents strongly thus: "It is clear upon the statute, that a rent cannot pass without three witnesses; for the statute says, '*lands and tenements*,' and a rent is a tenement; and if a tenement could pass without witnesses, it would be in direct opposition to the act." Whatever comes properly within the description of a tenement, or, to use the words of the Master of the Rolls in Buckeridge *v.* Ingram, (*c*) wherever a perpetual inheritance is granted, which arises out of land, or is in any degree connected with, or "exerciseable within it, it is that sort of property which the law denominates real, and cannot pass without three witnesses." It seems not to be doubted,

(*a*) 1 Eq. Ab. 409. (*b*) 2 Ves. Jun. 232.
(*c*) 2 Ves. Jun. 663, 4.

therefore, but that tolls, (*d*) where they are not for terms of years only, navigation shares, (*e*) commons, the profit of a stallage, petty customs, (*f*) market, fair, or piscary, (which are subject to dower, (*g*)) are within the clauses respecting the execution and revocation of wills. But in Stafford *v.* Buckley, (*h*) Lord Hardwicke held an annuity in fee, granted out of the $4\frac{1}{2}$ *per cent.* duties, upon goods exported from the West Indies, to be a *personal* hereditament; and in Lady Holderness *v.* The Marquis of Carmarthen, (*i*) it was held by Lord Thurlow, that an annuity charged upon the post-office, till a sum to be laid out in land should be paid, was a personal annuity; and the inference is, that such property may be passed by a will not attested by three witnesses.

So also tolls, navigation shares, commons, stallage, piscary, &c.

SECT. III.

Attendant Terms.

TERMS of years will pass (1) by a will unattested: but terms attendant on the inheritance are, as to the equitable interest in them, within the statute, though

Terms attendant upon the inheritance are within the statute 29 Car. 2. c. 3.

(*d*) 2 Blackst. Com. 20.

(*e*) Drybutter *v.* Bartholomew, 2 P. Wms. 127. Buckeridge *v.* Ingram, 2 Ves. Jun. 652.

(*f*) Mayor of Yarmouth *v.* Eaton, 3 Burr. 1402. Negus *v.* Coulter, Ambl. 367.

(*g*) Co. Litt. 19, 20. (*h*) 2 Ves. 170.

(*i*) 1 Bro. C. R. 377.

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(1) But they cannot be *created* but by a will attested, because the *creation* of a term affects the *real estate.* The statute of Frauds takes notice of all lands devisable by the statute of Wills or by the custom of Kent, which shews that only freeholds of inheritance are within it. Attorney-General *v.* Graves, Ambl. 155.

the legal estate is exempt from its operation. The case of Whitechurch *v.* Whitechurch (*k*) will explain this point. Edward Whitechurch took a mortgage of Batcomb Lodge from one Bisse, for 500 years, to commence from the making, for securing the sum of 200*l.* and interest; and afterwards took another security of the same lands from Bisse, the mortgagor, for 1000 years, in the name of another person, but in trust for himself, to commence also from the making. After this Edward Whitechurch purchased the inheritance of the premises in his own name; and having no wife or issue male, made his will entirely in his own handwriting, whereby he devised the premises to his nephew, being the son of his younger brother Joseph Whitechurch, for his life; remainder to his son Edward Whitechurch, and to the heirs male of his body for ever; and made his brother, Joseph Whitechurch, his executor and residuary legatee.

It happened that this will, (though intended to be perfected as such) by reason of the testator's sudden death, had no date, nor any name subscribed thereto, nor was the same attested, but the executor had proved it in the spiritual court, and assented to the devise to the nephew; whereupon the elder brother's daughter, who was heir to the testator, brought her bill, in order to compel the executor and the devisee to assign over the term to her.

It was objected for the defendants, that the executor had assented to the devise, and that the will, though not attested by three witnesses, was however good at law to pass this term of 500 years, which was a subsisting term, and not merged in the inheritance, by reason of the intermediate term, and which intermediate term operated as a grant of the reversion, and not as a grant of a future interest, (for it was admitted that a future interest would not prevent a merger:) but this grant of 1000 years, being to commence from the making, did

(*k*) 2 P. Wms. 236.

pass the reversion for 1000 years; which was acceded to by the Court.

Then if this will would pass the term at law, and was agreeable to the intention of the party, it was said to be very hard that equity should interpose to disappoint the will, especially when it was in favour of so near a relation as a nephew of the testator, and one of his own name; and all this for the sake of one not more nearly related; and who, on her marriage, would probably change her name. It was furthermore added, that in all cases between volunteers, (as the heir and devisee were here) he that had the law on his side used to prevail.

But it was decreed by the Master of the Rolls, that as this was a term which would have *attended the inheritance,* and in equity have gone to the heir and not to the executor, in which respect it was to be considered *as part* of the inheritance; so the will which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term; that though it was true, such a will as in the present case would be sufficient to pass a term in gross, yet it should not pass a trust of a term attendant on an inheritance. That a will, not attested as the statute of Frauds requires, should not pass any estate of which the heir, as *heir,* would otherwise have had the benefit. That if the devisee of the land had brought a bill against the executor and heir, to have compelled the executor to consent to this devise, a court of equity would not have decreed it for the devisee; and if so, the voluntary act of the executor's consenting would not alter the case, for at that rate it would be in the power of the executor to make it a good or a void devise, just as he should think proper. Besides, the Court observed, that it was the intention of the testator in the present case, not to pass the term *only,* but also to convey the inheritance which was expressly disposed of by the will, to the nephew for life, remainder to his first and other sons in tail. Though as to this, it was said to be extremely

hard, that because quite so much as was intended could not pass, therefore, the devisee should be deprived of that which might lawfully pass, and which was a less estate than was intended him; or, because *all* could not pass, therefore nothing should. However, for the above reasons, the Court decreed the devisee and executor to join in assigning the term to the plaintiff, the testator's heir at law, but no costs on either side; this decree was afterwards affirmed on an appeal by the Lords Commissioners Gilbert and Raymond.

When this cause was reconsidered on the appeal before the Lords Commissioners Gilbert and Raymond, (*l*) Gilbert, Baron, was of opinion, that this was a term attending the inheritance, and to protect the same from intermediate incumbrances, and that an unmerged term in the same person is in him in nature of a trustee to attend the inheritance, and that it would be very dangerous to all the inheritances in England, if unmerged terms should be taken to be terms in gross in the owners of the inheritances, and pass as such.

If this should be construed a term in gross, then it was such a chattel interest as might pass by the will, though all the solemnities required by the statute were not observed: but if it was a term annexed unto, and attending the inheritance, it could not pass by this will in any other manner than the inheritance would pass. It had been allowed at the bar, that the term for two thousand years was annexed to the inheritance, but it was said, that the term for five hundred years was not: no reason, however, was given why there should be such a difference between these two terms, that one should, and the other should not attend the inheritance; and certainly it could never be said with any colour of reason, that, where a mortgagee of a term of years purchased the inheritance, that such term, when in himself and unmerged, should go and descend in a course different from the inherit-

(*l*) 9 Mod. 127.

ance; for it was the constant and uniform construction in that court, that such a term shall be annexed to, and protect the inheritance, and attend the same; and it would be a dangerous construction in equity to make the inheritance and the term separate and distinct estates in one person. (*m*)

Lord Commissioner Raymond differed from Baron Gilbert in a part of the view which he took of this doctrine. He was of opinion, that where a term comes to an executor, by implication, as a chattel interest, or to a devisee by a general devise of all chattels; or where it vests in an administrator, generally, for want of a will; in such cases, the heir at law would be competent to apply to the Court to have the term assigned to another, to attend and protect the inheritance: but that, since it was agreed on all hands that the term passed at law, it was a question, whether that court could take it from him to whom it was *expressly* devised, in favour of the heir at law, who was a volunteer as well as the devisee?

He was of opinion, however, that where a term was *expressly limited to attend the inheritance*, there, though the testator likewise *expressly* devised it to another, it would not pass beneficially: but that where it attended the inheritance only by construction or operation of law, or in an equitable notion, as a term brought in and assigned by creditors, or a term raised for children's portions, or for other particular purposes; there, if the testator *expressly* devised such term, it would pass. For where a man had a term for years, which only by intendment of law attended the inheritance, certainly he had a power to sever such a term from the inheritance; and if he should assign it to one man, and mortgage the inheritance to another, in such case the term should not attend the inheritance, but would become a term in gross;—and why should not a man have the like power to do the same thing by will, if he thought fit. But as

(*m*) And see Villiers *v.* Villiers, 2 Atk. 71.

in that will there was no apparent intention, that the testator designed to pass this term as a separate interest from the inheritance, though there were sufficient words to pass it in general; it was to be considered, whether such *general* words should, after the death of the testator, sever that term from the inheritance, which attended and protected it in notion of equity, before such devise was made.

Comments on the doctrine laid down by Lord Commissioner Raymond in Whitechurch v. Whitechurch.

The distinctions taken by Lord Commissioner Raymond may be more readily understood, by being stated as follows:—that a term of years may have become attendant upon the inheritance after all the express purposes of its creation are satisfied, by consequence and operation of law; or, after such satisfaction, it may have expressly received this ulterior destination by actual assignment for this purpose:—that *if* a term be in the predicament first above supposed, and a person, having in himself such term unmerged, by reason of an intervening reversionary term outstanding, or by reason of the legal estate in the inheritance being in another for his benefit, *expressly devises* the term by a will capable only of passing *chattel* interests, the term will be severed from its *accidental* connection with the freehold, and will go to the devisee as a beneficial interest; or, in other words, will pass in equity as well as at law. That if it be not so *expressly* devised, the heir at law will be entitled beneficially to the term for the protection of the inheritance; or, in other words, the equity in the term will descend as *a part* of the inheritance for want of an execution of the will sufficient to pass freehold estates.

But supposing such satisfied term to have once received an express destination to attend upon the inheritance, then it seemed to the Lord Commissioner to be immaterial whether it were *expressly* and *by name* devised by the testator, or included under a *general devise of his chattels,* or suffered to devolve to the executor or administrator; it being that judge's opinion, that where such *express* limitation had been made, it

would not pass by a will unattested, though the testator *expressly devised it to another*.

The whole of this doctrine of the Lord Commissioner, who delivered his opinion to the effect last above mentioned, turned upon a distinction between a term assigned upon an *express declaration of trust* to attend the inheritance, and a term *constructively so attendant* by implication and operation of equity. But the case of Willoughby *v.* Willoughby (*n*) has clearly negatived any such distinction between estates expressly made attendant upon the inheritance, and those so considered by construction of equity. And in the same case it was also laid down by Lord Hardwicke that the term, in whatever manner it may have become attendant, may be disannexed and turned into a term in gross at any time by the owner of the inheritance, if he particularizes his intention so to disannex it.

SECT. IV.

Things annexed to the Freehold.

As to wills affecting things annexed to or growing upon the freehold.

A WILL must operate upon the testator's property according to the state it is found in at his death. Unless an actual severance has taken place in the lifetime of the testator he is incapable by his will, *unattested*, of *devising* the appendages of the freehold, in separation from the subject to which they adhere. And, therefore, according to Perkins, (tit. Devises,) from whom Swinburn (*o*) has copied the doctrine, those things, which after the death descend to the heir of the deceased, and not to his executor, cannot be devised by testament, except in cases where it is lawful to devise lands, tenements, or hereditaments. So the law stood before the statute of Frauds, and so it is apprehended it remains in

(*n*) 1 T. R. 763. (*o*) Part iii. sect. 6.

relation to the new requisites to a devise of freeholds introduced by that statute. The same rule extends to things which belong to the realty by simple annexation to the freehold; which may not be devised away by a will unattested, unless they were separated before the death of the testator; of which description are doors and windows, and even furnaces, ovens, tables and benches, if fixed and mortised in the earth; and so, in general, are all those accompaniment of the freehold which a tenant cannot remove or destroy without being guilty of waste. (*p*)

Trees.

If a man seised in fee of lands bequeath, by will sufficient only to carry personal estate, all his trees growing upon his land at the time of his death, the devise is void. But if he devise away the corn growing upon the same land at the time of his death, such devise will be good by a will unattested. The trees are parcel of the freehold till actually severed; and, unless devised away by a will applicable to freehold, descend, together with the land, to the heir: but the corn which was sown by the testator will go to the legatee of his personal estate, as goods and chattels. (*q*) If there be no personal bequest which will apply to it, then an express devise of the lands themselves, though no mention is made of the corn, will give it to the devisee; as the law holds in such case that the intention of the testator was to pass the land, together with its fruits. (*r*) But if there is neither bequest of the corn nor devise of the land, it will go to the executor or administrator, and not to the heir. (*s*)

Corn growing.

Thus, it has been always held that if a man be seised of land in right of his wife, and sow the land, and devise the corn growing thereon, and die before the corn be reaped, the legatee shall have the corn, and not the

(*p*) 4 Rep. 64.; and see Lawton *v.* Lawton, 3 Atk. 12.

(*q*) Fisher *v.* Forbes, 2 Eq. Ca. Abr. 392.

(*r*) Winch, 51. Cro. El. 61, 461. Roll. Abr. 727.; and see Cox *v.* Godsalve, 6 East. 604, n.

(*s*) Gilb. Evid. 247.

wife. The reason of the law in which particular is, that the corn is *fructus industrialis*, and he who sows it has a kind of property in it divided from the land, gained by the *very act of sowing it*. (*t*) If however one jointenant sows the land, and dies before it is reaped, the corn survives with the land, (1) because he gained no exclusive property by the act of sowing it; for he had no exclusive property in the land. But if A., seised of land, sow it with corn, and then convey it to B. for life, remainder to C. for life, and then B. die before the corn is reaped, C. shall have it, and not the executors of B., though his estate was uncertain, for the reason of industry and charge fails. And if B. and C. both die, then the lessor who sowed the corn shall have it. (2)

Grass and herbage.

But the law is otherwise in respect to trees, and also the grass and herbage not separated from the ground at the time of the death of the testator; for this is not *fructus industrialis*; and, therefore, as a tenant for life cannot by a will properly executed to pass freehold estate make any disposition thereof to operate after his death, so neither can the owner of the land in fee simple pass it in separation from the land by a will executed only to pass chattel and personal property. And it will be the same if the natural product is increased by the sowing of hayseed, or other assistances of cultivation. (*u*)

(*t*) Hob. 132. (*u*) Co. Lit. 185 b.

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(1) Cro. Eliz. 61. Dyer, 316. (*a*). Nevertheless if one of the jointenants occupies the land alone, by the consent of the other, and takes the profits alone to his own use, it seems that if he sow the land, he may devise the standing corn away from the survivor, as *fructus industrialis*, and such devise will be good and effectual, without witnesses; for it is said, that such assent to his sole occupation of the land amounts to a lease at will, and, as such, gives a title to emblements; but such assent by the companion must be express and positive. Cro. Eliz. 314.

(2) Cro. Eliz. 61. For the doctrine as to emblements, see Perk. s. 530. Co. Lit. 41, 45. Hob. 132. Roll. Abr. 727. Gilb. Evid. 246. Com. Dig. tit. Biens, G. 1. c. 2.

Heir-looms.

With respect to heir-looms(3) which by custom have gone with a house, they cannot be devised separately *by the owner of the fee-simple, even by a will executed to pass freehold estates;* for the will does not take effect till after the death of the testator; by whose death the heir-looms by ancient custom are vested in the heir, and the law prefers the custom to the devise. (*y*)

SECT. V.

Mortgages.

Mortgages in equitable consideration are not within the clauses respecting wills in the statute of Frauds.

WE have seen, a little above, in the case of attendant terms, an instance wherein chattel interests in land, though devisable *at law* by a will not executed and attested according to the statute, are from the particular view taken of them in courts of equity deemed by those tribunals to be as much the objects of the requisitions of the statute as estates of inheritance. The converse of the doctrine holds in respect to *mortgages:* this interest being regarded in courts of *equity* as entirely *personal,* a will unattested seems clearly to be capable of passing the beneficial right to the land; so that the devisee, under such a will of the land mortgaged, would be permitted by the Court to use the name of the heir to compel payment of the money, or make the pledged estate his own by foreclosure. In equitable contemplation the *estate* in the land remains in the mortgagor, while, in respect to the interest of the mortgagee, the land takes the character of personalty as following the nature of the debt, to which it is a collateral security; insomuch that if a mortgagee, after

(*y*) Roll. Abr. 727.

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(3) *Loom* is a word of Saxon original, signifying *limb* or *member.* Spelm. Gloss. 277.

making his will, forecloses the mortgage, or obtains a release of the equity of redemption, the mortgaged lands will not pass inclusively under the general words, lands, tenements, and hereditaments, contained in the will, but will go as an *acquisition*, or *purchase*, subsequent to the will, to the testator's heir at law.(z)

It is clear that the mortgagor cannot pass his equity of redemption by a will unattested; and if the mortgagee were also under the same restriction, the statute would cut two ways, and equity would be inconsistent with itself, inasmuch as such double operation of the statute would imply the existence of the real estate at the same moment in two persons distinctly. The truth seems to be, that the mortgagee's interest is contemplated in this court rather as a *right* than an *estate*, while the equity of redemption has rather the quality of an *estate*, than a *right*. Thus it was said by Lord Hardwicke, that in the eye of a court of equity, the equity of redemption was the fee-simple of the land;(a) and though Sir M. Hale called it an equitable right, yet he added, that it was inherent in the land, binding all persons coming in the post, or otherwise.

SECT. VI.

Election in Equity.

An unexecuted will is not even of force to raise a case of *election* against a person taking a benefit in the personal estate by the same will.

IT is to be observed, that a will of real property, not executed and attested as the statute directs, is classed among those acts which the law holds *to all intents and purposes void*; so that neither courts of equity nor of law will pay regard to the intention of the testator, unless he has given it effect in the manner dictated by the Legis-

(z) See Casborne v. Scarfe, 1 Atk. 605. Sir Litton Strode v. Lady Russel, 2 Vern. 621. Winn v. Littleton, 1 Vern. 3. 2 Vent. 351. 3 P. Wms. 62.

(a) 1 Bl. Rep. 145.

lature. Upon this principle such unexecuted will is not even of force in a court of equity to raise a case of election against a person taking a benefit in the personal estate. (*b*) In Hearle *v.* Greenbank, (*c*) D. W. devised all his freehold, copyhold, and real estate, whatsoever and wheresoever, and all his leasehold estate, to two trustees, their heirs, executors, administrators and assigns, in trust to apply the residue, after paying their own charges, to the separate use of his daughter, M. W., a married woman, during her life, to be at her disposal; not subject to the debts or control of her husband; her receipts to be good, and to be permitted by deed or writing, executed in the presence of three or more witnesses, notwithstanding her coverture, to give and dispose of all his freehold, copyhold, and leasehold estate, as she should think fit; and he gave to the same trustees, whom he made joint executors, his personal estate, in trust, for the sole and separate use of M. W., and to be at her disposal, and not subject to the debts or control of the husband. M. W., then under the age of twenty-one, but above seventeen, made her will; and thereby, in pursuance of her power in her father's will, gave 8000*l.* to her daughter Mary when she attained the age of twenty-one. She then devised the residue of her real and personal estate to the plaintiffs, the two Hearles, their heirs, executors, and administrators, for ever.

The bill was brought by the plaintiffs to have the appointment made by M. W. of the real estate in their favour established: but the Court considering the will to be void by reason of the nonage of the mother, adjudged it a bad execution of the power. Then the question arose, whether the daughter and heir at law could take the legacy of 8000*l.* under the will, which was well devised, (the testatrix being of a capacity to dispose of personalty,) and at the same time claim the lands by descent, against the appointment, or was put to an election upon

(*b*) 7 Ves. Jun. 372. (*c*) 1 Ves. 198.

the rule which incapacitates a person to dispute a will in any part under which he claims. And the case for the heir was thus put at the bar. It was said that the rule was true, when properly understood, that wherever a person claims under a will, and by the same will *properly executed,* land or any thing else is devised to another, which the testator had not a title to, the person claiming under the will shall not dispute the title; since the will manifests the intent how the whole should go; but that this rule did not go to make good what was in effect *no will:* that the case under consideration was one in which there was *no will;* it was not the case of a will impeached for want of title in the testator; it was like a devise to a charitable use, since the statute; it was not want of title, but want of capacity to make any will at all of real estate.

To this distinction the Chancellor seemed to accede; observing, that as to the equity of the plaintiffs arising from the claim of the 8000*l.*, it was true, it was determined in Noys *v.* Mordaunt, (*d*) that if lands in fee were given to one child, and to another lands entailed, it was meant they should release to each other, and the Court had gone farther since,—to the case of a personal legacy. But still he was of opinion, that this differed from all those cases, and that the heir at law was not obliged to make her election, for in the case before him *the will was void;* and that where the obligation arose from the *insufficiency of the execution,* or *invalidity* of the will, there was no case where the legatee was obliged to make an election; for there was *no will* of the land.

His Lordship put the case of a devise by a testator of a legacy to his heir at law, and of the real estate to another; where, if the will were *not executed according to the statute of Frauds* for the real estate, the Court would not oblige the heir at law, upon accepting the legacy, to give up the land. Such a case, he said, differed from Noys *v.* Mordaunt, in the reason of the thing:

(*d*) 2 Vern. 581.

there the testator devised some lands which were, and others which were not, his own; and the Court said, that the devisee should suffer the lands to pass, as if they were the devisor's own. But in the principal case, whether the lands were the testator's own or not, they could not pass by the will.

But if in such unexecuted will there is a legacy to the heir *upon condition* that he did not dispute the will, he is put to his election.

But in Boughton *v.* Boughton (*e*) a distinction was taken as to this point, by the same Chancellor who determined Hearle *v.* Greenbank, which has been recognized and confirmed by subsequent authorities, though with some remarks upon its refinement and subtilty. In this case of Boughton *v.* Boughton, it was held that a legacy to an heir, *upon the express condition* that he did not dispute the will, would put the heir to an election, between the legacy and the lands devised away, although the will was not executed according to the statute. The case was as follows:—A freeman of London devised his real estate to his younger son, Stephen Boughton, and all his personal estate among his children; among the rest, 1,200*l.* upon some contingencies to Grace, the daughter of his eldest son; adding this clause, "if any child or children of mine, or any in their right, or any who may receive benefit by my will, shall any way litigate, dispute, or controvert the whole, or any part thereof, or the codicils thereto belonging, or not give such discharges as my will requires, or not comply with the whole, and all and every condition and conditions therein contained, both as to real and personal estate, such child or children, so far as it relates to them severally, shall forfeit all claim and pretence whatever under my will, and shall have no more than the orphanage part of the personal estate I die possessed of; revoking what I gave to them, I give it to my residuary legatees." The testator underwrote to this instrument an attestation in the common form: but the will was not signed either by himself or by any witness, There was a codicil, without date, but signed

(*e*) 2 Ves. 12.

by him, therein taking notice of and reciting, that in further consideration of that his last will, he made a codicil thereto, and gave directions therein.

Grace, by the death of her father, became heir at law to her grandfather, and so entitled to whatever he left to descend, or which ought to descend, from the invalidity of his disposition. She being an infant of tender years, this bill was brought by Stephen, the youngest son of the testator, and devisee of his real estate, in order that she might make her election, whether she would have the 1,200*l.*, or the land which happened to descend to her; for that she could not claim both: but, if she chose the legacy, she must let the real estate go according to the intent. The point is particular, and the Chancellor's judgment perspicuous; it may be instructive, therefore, to the reader to lay it before him at some length.

His Lordship said, he was satisfied that the infant ought not to take the benefit of the personal legacy, without at the same time waiving any right to the descended lands; and that it was very different from Hearle *v.* Greenbank. The testator had made one instrument, in which he had used words, expressions, and clauses, relative both to real and personal estate; and in it was contained a clause, importing in words, though not by force of the instrument, to be a devise of the real to the plaintiff, giving 1,200*l.* to his grand-daughter, and taking upon him to dispose of his whole personal estate among his children, who would not be bound thereby, as he was a freeman. He then added the *express* clause which was the sole ground of distinction between this and other cases; and in the codicil, took notice of that very instrument as a will. The codicil was signed; which put that difficulty, which otherwise might have arisen from the imperfection of the instrument, out of the question. But notwithstanding this, it was a will only by force of the instrument, to pass *personal* estate; for neither the will or codicil was so executed as to pass real estate.

The plaintiff insisted, that the defendant, having a legacy by the will, which was undoubtedly good, should have no benefit thereof, unless she suffered the disposition of the land to take effect. In Noys *v.* Mordaunt,(*f*) (which was the first case) the testator was disposing of land. The subsequent cases, till Streatfield *v.* Streatfield, (*g*) were all of a devise of real estate. Had the rule gone no further, but been confined to real estate, this objection had never risen, because the instrument must be effectual, as well to one real estate as another; so that if they had both been real estates, this difficulty could never have arisen so as to make the point come into question. Lord Talbot went so far as, where the will comprised both real and personal estate, and the land, to which one child was entitled in tail, was thereby given to another, and a personal legacy to the tenant in tail, to consider it as an implied intent, that whoever took by that will, should comply with the whole; so that he put the party to an election: but neither in Jenkins *v.* Jenkins, nor in Streatfield *v.* Streatfield, was there a question of the *defect of the instrument.*

Then came Hearle *v.* Greenbank, which was the first case, in which the difficulty arose upon the *defect of the instrument.* In which case his opinion was, that there was no ground for the Court to imply a condition to abide by a will of land, when there was, in fact, no will; and that it would be dangerous to break in upon the statute of Frauds, by making an estate to pass by an instrument not sufficient to pass real estates; and *that,* not by the words of the testator, but by a condition implied by construction of the Court; therefore, it could not be, nor was it warranted by any precedent, for it was only guessing at the intent of the testator, who might leave it with that very view. But the question was, whether the case before him did not differ from that by reason of the express clause in the will. It had been very candidly admitted, that if there was no devise

(*f*) 2 Vern. 581. (*g*) Cas. temp.Talb. 176.

of a real estate, but a personal legacy was given on an express condition, that the legatee should not enjoy it, unless within a certain time he conveyed a real estate, whether coming from the testator or not, he should not enjoy it but on those terms; the lands not passing by force of the will, but by the operation of the particular clause stipulating the condition. The legatee had it in his power either to part with the land, or not; if he chose not to part with the land, he forfeited the condition; for any lawful condition might be annexed.

The case might be put a little farther, his Lordship said, (though it was almost the same as the one before him) as, suppose in the same instrument there was a devise both of real and personal estate, the will executed only to pass the personal, and not the real: but a condition annexed that the personal legatee should permit the same persons, to whom the land was given, to hold to them and their heirs: the condition annexed would take place, though the devise was void as to the lands according to the statute of Frauds; for the legatee could not take it in contradiction to the testator's words; and the devise in the principal case amounted to the same, as if the testator had annexed a condition to permit Stephen to enjoy the land. The Court must put a reasonable construction, which was, that none of the devisees should receive any benefit by the will, unless they suffered the whole instrument to take effect; not having regard to the validity or force of it, according to the statute of Frauds, but to the clauses and expressions used. In Hearle *v.* Greenbank, there was no condition expressed in the will; it rested singly on the construction the Court was to make, upon the implied condition that those claiming benefit by it should suffer the whole to take effect; and then it must necessarily refer to the validity of the will; for it was rightly argued, that the will could not be read so as to support a disposition of real estate, not being an instrument for that purpose.

In that case, when the Court was to make such a

construction by implication from the force of the instrument itself, the Court must see the will, and could not take notice that it was a will of real estate: but in the case before him, where there was such a condition annexed to a personal legacy, the Court must consider every part of that legacy, whether it had relation to real estate or not. You must read the whole will respecting the personal legacy, let it relate to what it will; which was a substantial difference, his Lordship said, and would prevent his going so far as to break in upon the statute of Frauds, and at the same time would attain natural justice, which required, as far as might be, such construction to be made, otherwise the intent of the testator might be overturned.

But as there might be a difficulty how to carry the will into execution, (for being an infant of tender years, she could not judge for herself, nor could the master judge for her, it being on several contingencies, so that until she came of age, no election could be made,) his Lordship said, the plaintiff must till she attained her age receive the rents and profits of the estate, subject to further order of the Court, but must be restrained from committing waste. If the infant should elect to have the land, then whatever the plaintiff should be entitled to as his orphanage part of the testator's personal estate, would be liable to make satisfaction for what he should have received out of the rents and profits of the real, as the Court should direct.

The distinction taken by Lord Hardwicke between the cases of Hearle *v.* Greenbank, and Boughton *v.* Boughton, was recognized and adopted by Lord Kenyon, in Carey *v.* Askew, (1) and of which the Chancellor gave the following account, as to the point now under consideration from his own note. "I have looked

(1) The case is reported in 2 Bro. C. C. 58: but the point under consideration in the text only appears to have made a part of it, by the notes referred to by the counsel for the heir at law, and by the Chancellor in Sheddon *v.* Goodrich, 8 Ves. Jun. 481.

at my own note of Carey *v.* Askew. Lord Kenyon there said the distinction was settled, and was not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will under an express condition to give up a real estate by that unattested will attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election; and he could not take the legacy without complying with the express condition. But Lord Kenyon also took it to be settled, as Lord Hardwicke had adjudged, that if there was nothing in the will but a mere devise of real estate, the will was not capable of being read as to that part; and unless the legacy was given so that the testator said expressly, that the legatee should not take, if the condition was complied with, it was not a case of election. The reason of that distinction, if it were *res integra,* is questionable."

In the late case of Brodie *v.* Barry, (*h*) the Master of the Rolls observed, that if it were necessary to discuss the principles upon which the doctrine of election depended, it might be difficult to reconcile to those principles, or to each other, some of the decisions which had taken place upon the subject. He did not understand why a will, though not executed so as to pass real estates, should not be read for the purpose of discovering in it an implied condition concerning real estate annexed to a gift of personalty, as it was admitted it must be read when such condition was expressly annexed to such gift. For if by a sound construction such condition was rightly inferred from the whole instrument, the effect seemed to be the same as if it were expressed in words.

(*h*) 2 Ves. and Beam. 127.

SECT. VII.

Estates by Custom.

IT may be considered as settled doctrine that wills of copyholds stand clear both of the statute of Frauds, and of the statute of Wills. By regarding the surrender as the mean whereby the lands themselves are transferred, and the will, as having no specific operation under the statute of Wills, but as a mere declaration of an use, or rather an appointment of the person to be admitted upon the surrender, we see the reason (not always indeed approved of) for holding wills of copyhold lands to be out of the statute of Frauds, there being no *special* provision applicable to copyhold estates contained therein. Accordingly in Carey *v.* Askew, (*i*) it was held by Sir Lloyd Kenyon, Master of the Rolls, that any testamentary paper would be sufficient to pass copyhold lands; and his Honour said, "he hardly expected to hear it seriously argued. It had been held, that a will received by the ecclesiastical court would govern the surrender of a copyhold. It would be removing landmarks to entertain a doubt upon the subject."

Lords Macclesfield and Hardwicke not satisfied with the reason.

Lord Macclesfield (*k*) admitted the same doctrine as perfectly settled in his time, though certainly not with any approbation of its reasons. He said, that it was plain, that as to the case which had been put of a copyhold surrendered to the use of a will, and afterwards devised by a will attested by one or two witnesses, such devise had been adjudged to be good, and that his opinion was, *never to shake any settled resolution touching property or the title of lands,* it being for the common good that these should be certain and known, *however ill-grounded the first resolution might be:* but if that had not been settled, it might be more reasonable to

(*i*) 2 Brown, C. R. 58. (*k*) 2 P. Wms. 258.

say, when a man has surrendered his copyhold to the use of his will, a will of this copyhold shall be so executed, and in such a manner, as by the act of parliament a will of lands ought to be executed.

Agreeable to which opinion of Lord Macclesfield was that of Lord Hardwicke in the Attorney-General *v.* Andrews, (*l*) who, after mentioning this established doctrine in respect to wills of copyholds, observed that, perhaps, if those determinations were now originally to be considered, courts of law and equity would not have gone so far; and that it might be wished it were altered, as it was subject to the same inconvenience as the devise of freehold lands.

Same doctrine as to *trusts* of copyholds.

The sentiments of Sir Joseph Jekyll seemed to accord with those of Lord Chancellor Macclesfield, on the impropriety of going *one jot farther* than the doctrine had already gone in respect to the devises of copyholds; and, therefore, he took a distinction between a devisee of the *legal* estate in a copyhold, duly surrendered to the use of the will of the surrenderer, (as to which he admitted that the attestation of witnesses was not necessary,) and the devise of a *trust* or *equity of redemption* of a copyhold. This opinion appears in a memorandum of the reporter, in 2 P. Wms. 259. annexed to the case of Wagstaff *v.* Wagstaff, which was as follows:—" Memorandum in Hil. vac. 1727, in a cause at the Rolls, his Honour admitted it to be settled, that where a copyhold in fee is surrendered to the use of one's will, such will, though executed in the presence of one or two witnesses, is good, because it passes by the surrender and not by the will, which is only a declaration of the use of the surrender: but that if a copyholder be seised only of the *trust* or *equity of redemption* of the copyhold, and devise such trust, or equity of redemption, there must be three witnesses to the will; for here can be no precedent surrender to the use of the will to pass this trust; and the trust and

(*l*) 1 Ves. 225.

equity of redemption of all lands of inheritance are within the statute of Frauds and Perjuries, otherwise great inconvenience would arise therefrom; and it is no prejudice to the lord of a manor to comprise the trust of a copyhold within that statute, because the person who has the legal estate in the copyhold is tenant to the lord, and liable to answer all the services."

But in Tuffnell *v.* Page, before Lord Hardwicke in 1740, a different opinion was maintained by that chancellor on this subject. His Lordship said, he would consider the case in two lights—first, whether the will of a copyholder, unattested by witnesses, was sufficient to declare the uses of a surrender, made to the use of a will; and, secondly, where there was no surrender, as in the case before him, whether such a will was sufficient to pass the trust of the copyhold lands to the plaintiff.

With respect to the consideration of the question in the first of these lights, his Lordship said, that "where a man was seised of copyhold lands and surrendered to the use of his will, and executed a will, though not attested by witnesses, yet it should direct the uses of the surrender; for the clause in the statute of Frauds and Perjuries, which required the testator's signing in the presence of three witnesses, and their attestation in his presence, was confined only to such estates as passed by the statute of Wills 34 H. 8. c. 5. which was an act to explain one made in the 32d of the same King; and which at the close of the section enacted, that the words, estate of inheritance, in the former statute, should be declared, expounded, taken, and judged of estates of fee simple only, which shewed plainly, that it did not extend to customary estates, and had been so settled ever since the case of the Attorney-General *v.* Barnes, reported in 2 Vernon, where it was said that, as to such of the lands as were copyhold, it was agreed they were well appointed, they passing by surrender and not by will, though there were no witnesses to it.

As to the second point, whether the will in question would pass the *trust* of the copyhold lands, his Lordship said, that "where the legal estate was in trustees, the *cestui que trust* consequently could not surrender, but the lands should, notwithstanding, pass by this devise according to the general rule that equity follows the law: for a copyhold would pass under a will without three witnesses, or where there were no witnesses at all; and if this nicety was not required in passing the legal *estate, a fortiori* it was not in passing the *equitable:* and, therefore, the *cestui que trust* might, by the same kind of instrument, dispose of the trust estate, as if he had the legal estate in him."

An attested will of copyhold may be revoked by an unattested will.

As the attestation of three witnesses is not *necessary,* so neither has it any *efficacy* in respect to copyholds; so that if a surrender be made to such uses as the surrenderer shall appoint by his will, and he afterwards make his will, executed and attested according to the statute of Frauds, such will is nevertheless subject to be revoked or republished by him by any subsequent testamentary paper, attested by one or two witnesses only, or without any attestation at all. (*m*)

If any mode of execution be prescribed with respect to copyhold it must be observed.

If a surrender be made to the use of a will, to be executed according to the statute, or with any other solemnities, it is clear that such prescribed requisites must be strictly complied with as in other similar cases. (*n*)

A will disposing of the equitable estate in customary freeholds must be executed and attested according to the statute of Frauds.

But although it seems now to be regarded as settled, that the trust or equity of a copyhold estate will pass by a will not executed or attested according to the statute of Frauds, upon the principle of *equitas sequitur legem,* and on the ground that a strictness which had been dispensed with in respect to the *legal* estate in copyholds ought *a fortiori* to be dispensed with in respect to the *trust* estate in copyholds, yet a different doctrine seems to have obtained concerning the equitable interest of a *customary freehold,* where there exists no

(*m*) Vid. Burkitt *v.* Burkitt, 2 Vern. 498.
(*n*) Vid. Cotton *v.* Layer, 2 P. Wms. 623.

custom of the manor for surrendering them to the use of a will. This was so held in the case of Hussey *v.* Grills, (*o*) where Elizabeth Prowse, being seised of a customary estate within the manor of Stoke Climsland in Cornwall, surrendered it to Thomas Jones and his heirs, who afterwards declared the trust to be for Elizabeth Prowse, her heirs and assigns, and covenanted to surrender to such uses, as she should by deed, executed in the presence of two witnesses, or by her last will appoint. Elizabeth Prowse afterwards made her will in writing, not attested according to the statute of Frauds; (but which seems to be mistakenly reported, as the decision and reasoning of the case plainly suppose and require the will to have been effectual, and consequently executed according to the statute,) and devised the customary estate to Margaret Archer, her heirs and assigns for ever. She afterwards made a codicil in her own hand-writing, but unattested; and thereby revoked the devise in her will of the customary estate, and gave it to Margaret Archer for her life only, with remainders over; and the doubt was, whether the codicil was a good revocation of the will, and passed the customary estate.

The Lord Chancellor Hardwicke said that the question was, whether these customary estates were, in point of conveyance or devise by will, so far like copyholds, that the determinations with respect to the latter should govern these in like manner and parity of reason. That Courts ought to avoid making large and liberal constructions to take cases out of the statute of Frauds; which was made to ascertain property, and the words whereof were very extensive. That copyholds were not devisable by will, nothing passing out of the surrenderor till the will was made; and when it was made, the lands did not pass by the will. The devisee might come and be admitted on the foot of the surrender and will taken together, just as if the name had been inserted

(*o*) Ambl. 299.

in the surrender itself. That the ground of his opinion in Tuffnell *v.* Page was *equitas sequitur legem*;—but that customary freeholds and copyholds differed extremely in their nature,—the latter being of a base tenure, and by the old common law held at the will of the lord, though now established on a more firm footing; customary freeholds never were of the base kind. That Jones was a trustee, and the legal estate was in him. There was no evidence that there could be in that manor a surrender of a customary freehold. It was agreed that there never was such. That the foundation of the determination as to copyholds was, that the party might dispose by surrender and will. As there was no method of passing the legal estate of these customary freeholds in that way, there was no reason to hold them out of the statute. And if the legal estate was not so, so was not the trust. There was something, observed his Lordship, arising out of the declaration of trust, which induced him not to make a large and liberal construction; for as two witnesses were required by it to the execution of a deed, it seemed strange to think that in case of execution by will it might be on a loose paper, without any witnesses at all.

But where there is a custom for surrendering these equitable estates to the uses of a will they seem to be out of the statute.

It has been held, however, in the late case of Cook *v.* Danvers, (*p*) that such customary freeholds, where there is a custom for surrendering them to the use of a will, are as much out of the statute of Frauds as common copyholds; and it should seem that the trust also of such estates would, by analogy to the principle of the case of Tuffnell *v.* Page, be considered as out of the statute.

All equitable estates of freehold must be devised by a will executed and attested according to the statute.

It seems scarcely necessary, after the opinions and determination which have been produced, to observe to the reader, that in a devise of a *trust* or *equitable estate* in freehold lands, the formalities of execution and attestation required by the statute are as necessary to be observed as in wills disposing of the *legal* estate.

(*p*) 7 East. 299. Sup. 40.

There can be no question, said Lord Macclesfield,(q) but that a trust of an inheritance could not be devised otherwise than by a will attested by three witnesses, in the same manner as a legal estate; for if the law were otherwise, it would introduce the same inconveniences as to frauds and perjuries as were occasioned before the statute, by a devise of the legal estate in fee simple.

(q) 2 P. Wms. 258.

CHAP. V

PERSONALTY.

WITH respect to personal estate, except the will be made and proved according to the forms required by the 19th, 20th, and 21st sections of the statute 29 Car. 2. c. 3. to validate the nuncupative testament, or it be the case of soldiers on actual military service (who, by virtue of the 23d section of the said statute may still make nuncupative wills without the necessity of observing the forms to which nuncupative testaments are subjected by the preceding clauses,) all testamentary dispositions thereof must, since the statute of Frauds, be in writing.

The Ecclesiastical Courts, to whose jurisdiction the establishment of personal testaments appertain, require no ceremonies in the publication thereof, or the subscription of any witnesses to attest the same. Swinburn seems to have considered it necessary, indeed, that a testament of chattels should be published in the presence of two sufficient witnesses; (*a*) and Bracton (*b*) appears to have held the same opinion; or rather, according to Sir William Blackstone, to have copied implicitly the rule of the civil law. But it is not to be doubted that a will of personal estate, if written in the testator's own hand, though it has neither his name nor seal to it, *nor witnesses present at its publication*, is effectual, provided the hand-writing can be sufficiently proved. (*c*) It is also equally good in the hand-writing

(*a*) See Swinb. on Wills, Part i. s. 3.
(*b*) Lib. ii. c. 26. (*c*) Godolph. O. L. Part i. c. 21.

of another person, if signed by the testator; or even without having been signed by the testator, if it can be shewn to have been made according to his instructions, and to have received his approbation.(*d*) The instructions must therefore be committed to writing in the lifetime of the person giving them; or the testament must come under consideration as a nuncupative will, and be proved as such if established at all.

Of proving a will in the common and solemn form.

The proof of the will may be in two forms, of which the one is called the vulgar or common, the other is termed the solemn form, or form of law. If the will be not contested, the executor, or the administrator *durante minore ætate,* or *durante absentiâ,* or *cum testamento annexo,* may prove it by his own oath; or, as it is said, in some dioceses in York, with the addition of *one* witness, before the ordinary or his surrogate. But if the validity of the will be disputed, it then becomes necessary to prove and establish the will in the solemn way; or, as Swinburn expresses it, in form of law; that is, *per testes,* in the presence of such persons as would be interested if the deceased had died *intestate.* Two witnesses must then be sworn and examined upon interrogatories administered by the adverse party. Between which two forms of proving a will there is a substantial difference of effect; for after an informal proof the executor may be compelled again to prove the will in due form of law, which may be inconvenient if the witnesses should be dead in the mean time. The executor may, therefore, if he please, for greater safety, if he himself have an interest in the will, elect to have the will proved in the more solemn form;(*e*) and in such case he must cite the persons who would

(*d*) Limbery *v.* Mason and Hide, Comyns, 452. Gilb. Rep. 260. and see Sikes and Broderick *v.* Snaith, 2 Phill. 351., where an allegation propounding instructions committed to writing during the lifetime of the testator, but neither seen by him nor read over to him, were, under the peculiar circumstances of the case, admitted to proof. See also Wood *v.* Wood, 1 Phill. 365.

(*e*) Burn. Eccl. L. 208.

be interested under an intestacy, to be present at the probation thereof. If the will be only proved in the *common form*, it may at any time within thirty years be disputed: (*f*) but if the solemn form be pursued, and no adverse proceedings are instituted within the time limited for appeals, the will is liable to no future controversy. (*g*)

When a will is proved by the probation of the more formal or solemn kind above alluded to, the civil law rule of establishing all proof upon the testimony of two witnesses is followed in our Ecclesiastical Courts. And such witnesses must be able, at least, to depose that the testator declared the writing produced to be his last will and testament, unless where the will or codicil was written by the testator himself; in which case, as has been above observed, the validity thereof may be established upon proof of the hand-writing only. But it ought to be by the evidence of such as have seen him write; (*h*) and though this evidence ought, in general, to be given by two witnesses, yet, if there be one subscribing witness, who appears to attest the fact of the identity of the will, the additional testimony of a single witness is said to be sufficient. And where the will has been wholly written by the testator, though not attested, and there are corroborating circumstances, the clear testimony of one witness has prevailed in the spiritual court. The general necessity for the evidence of two witnesses is borrowed from the Roman law; the maxim of which is, that one witness alone cannot be heard, or, in other words, is no witness at all. (*i*) "*Unius responsio testis omnino non audiatur.*" (1)

Of the general necessity for two witnesses to establish a fact in the Ecclesiastical Courts.

(*f*) Godolph. O. L. 62. (*g*) 4 Burn. Eccl. L. 207.
(*h*) See the case of Eagleton *v.* Kingston, 8 Ves. Jun. 438.
(*i*) See the case of Thwaites *v.* Smith, 1 P. Wms. 13.

(1) Cod. 4. 20. 9. Where the Ecclesiastical Court proceeds in a matter merely spiritual, or confined to their own jurisdiction, no prohibition lies, if their proceedings are contrary to common law; as if they refuse the testimony of one witness. But if they disallow the proof of a temporal matter, by one witness, though such temporal

Notwithstanding the rule of the Roman law, that *nemo testis esse debet in propriâ causa,* legataries were permitted to give evidence in support of a will, upon the distinction between particular and universal successors; but by the practice of the ecclesiastical courts of this kingdom, no legatee could be received to give his testimony to establish a will of personal estate, until his interest had been removed by his receipt of the value of his legacy, or until he had renounced it, and discharged the executor. (*k*) The necessity for which discharge, however, was removed by the statute 25 Geo. 2. c. 6., which has extinguished the interest of the subscribing witness at the moment of his attestation.

If the writer of the will takes a legacy or considerable benefit under it, more than ordinary proof of the authenticity of the will is expected, as the Courts look with great jealousy upon such a transaction. The will indeed, is not thereby invalidated in the whole or in part, but it becomes the subject of stricter proof;—the presumption and *onus probandi* being against the instrument; and the capacity, free agency, freedom from surprise, and perfect cognizance of the testator, are, under such circumstances, matters of minute enquiry. Unbounded confidence in the drawer, extreme debility in the testator, clandestinity, and other such circumstances, greatly increase the onus of proof on those who seek to have the will established.(*l*) The presumption is also strong against an act done by the agency or procurement of the party benefited. (*m*)

(*k*) *Vide supra.* (*l*) Paske *v.* Ollat, 2 Phill. 323.

(*m*) Billinghurst *v.* Vickers, 1 Phill. 187. The effect of such acts was defeated and annulled by the civil law. Dig. Lit. 34. tit. 8. "*De eo quod quis sibi adscripsit in testamento.*" By the civil law a legacy was void if it had been written by the slave or son of the legatee. Dig. lib. 48. tit. 10. s. 15.

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matter be incident to a matter within their jurisdiction, a prohibition lies from the temporal courts. Shatter *v.* Friend, 1 Show. 158—172.: and see H. H. C. L. 5th edit. and the note (*q*) by the Editor.

Of the form of the testament.

As to the *form* of the instrument itself, the Ecclesiastical Courts are not scrupulous. A memorandum or scrap of paper, written (*n*) by a person in contemplation of death, and with a design to make it operative after that event, may be proved in that court as testamentary; and, if so received, it seems a court of equity will support it. A string of examples might be cited to illustrate this observation: many were produced in the case of Limbery and Mason *v.* Hyde, (*o*) among which that of Loveday *v.* Claridge is strong to the purpose.

Determinations of the Ecclesiastical Courts on this subject.

The testator intending to make his will, pulled a paper out of his pocket, and wrote down some things with ink, some with a pencil; and though it had no conclusion, but appeared to be a draft which he intended afterwards to finish, (for it was not signed, but had at the end a calculation of his effects, an account of his tea-table, and an order to pay a dividend of stock,) yet it was held to be a will.

Thus too, in a case where a woman, possessed of considerable real and personal property, wrote a letter to an attorney, her friend, giving him an account how she would dispose of the same; and in her ignorant way, added, "*please not to put this rigmaroll in till I find it correct—this only by way of memorandum, in case I should go off suddenly,*" and the testatrix survived the writing of that letter three or four months, but took no further steps therein: Sir George Hay was of opinion that, under the circumstances, such letter could not operate as the will of the deceased; but on an appeal, the Court of Delegates reversed his sentence.

In Cobbold *v.* Bowes, a gentleman gave instructions to his attorney to prepare his will for the disposition of his real and personal estate. The will was accordingly prepared, settled by the testator, and engrossed for

(*n*) See Cox *v.* Basset, 3 Ves. Jun. 158.

(*o*) Com. 452., and see Downing *v.* Townsend, Ambl. 280, 592.

execution with the usual clauses of attestation. This will was of considerable length, and at the left-hand corner of each sheet of paper was the word '*witnesses.*' Upon the death of the deceased, the will was found with his name subscribed to each sheet; and, opposite to the seal, on the last sheet; but not witnessed. Dr. Calvert, the then judge of the Prerogative Court, was of opinion that the deceased, *by permitting the clause of attestation to remain,* had bound himself down to a formal execution, and therefore pronounced against the will: but on appeal the Court of Delegates reversed such sentence, and thereby rendered the will valid as to the personal property. (2)

To the same effect was that of Wright *v.* Walthoe, cited in Limbery *v.* Mason, (*p*) where there were three testamentary schedules, whereof one was without date; to the second the words '*in witness*' were subjoined; and the third concluded abruptly; yet, being written by the testator, they were declared to be his will.

In the case of Worlick *v.* Pollett, before the Delegates, where the testatrix had sent for a person to make her will, and given him instructions for the same, and the will was accordingly drawn, read to, and approved by her, and declared by her to be her last will, and three witnesses were sent to see her execute, the words signed and sealed being already written, but she died before any other execution; it was held a good will before the Delegates, who affirmed the first sentence which had been reversed upon an appeal.

And again, in a cause of Brown *v.* Heath, determined in 1721, where a will of real and personal estate was prepared in order to be executed, though there were several blanks in it, and the testator died before execution; yet it was held a good will of the personal estate;

(*p*) Com. 452.

(2) See these cases more at large in a note by the Reporter to the case of Matthews *v.* Warner, 4 Ves. Jun. 200.

and though more was intended to be done, yet it was adjudged to be good for what was done.

But the later determinations at Doctors' Commons seem tending to establish a stricter doctrine. It now appears to be agreed, that if a testator leaves an instrument, which, upon the face of it, carries evidence of an intention in the framer to perfect it by some further solemnity, which he died without having superadded, having had afterwards sufficient time and health and recollection to complete it, such paper may be inferred not to have been intended to operate as it stood, and the omission to perfect it may ground a presumption of a change of mind in the deceased. Thus, also, where a person had written a paper, purporting to be a disposition of his property, to which a clause of attestation was added, but not filled up, sentence has been pronounced for an intestacy upon an inference, from this omission, of change of intention. But, on the other hand, such change of intention cannot reasonably be inferred from such omission, unless the writer of the paper had an opportunity of completing it. If, therefore, death intervene before he could be reasonably expected to complete the paper by having the attestation clause signed, there seems not to be sufficient ground for the inference above mentioned. And the inference at best goes no further than presumptive argument, capable of being repelled by slight circumstances. Thus, in a recent case, (*q*) where the state of the family and the frequent declarations of the testator went to shew, that a paper written by him, with a clause of attestation unsigned, but complete in other respects, contained his last intentions as to the disposition of his property; such paper was effectuated by the Prerogative Court.

The case of Griffin *v.* Griffin, (3) determined at the

(*q*) Harris *v.* Bedford, 2 Phill. 177.

(3) Cited in Matthews *v.* Warner, 4 Ves. Jun. 197, note (*a*); and see *ex parte* Fearon, 5 Ves. Jun. 644.

Commons a few years ago, was decided upon grounds which illustrate the negative side of the principle. Richard Griffin executed a testamentary paper, dated the 27th September, 1777. On the 18th January, 1789, he began a paper;—and, having written no more than the commencement of what he meant to do, being called away to dinner, he locked up the paper. On the 27th of the same month he died suddenly, while sitting on the bench as a justice of the peace. The questions were, whether this unfinished paper was a revocation of the former paper executed in 1777; or, whether it was to be established conjunctively with the former paper. It was determined that the unfinished paper could have no effect, the testator having lived eight days after making it, in health and capable of business; and not having concluded it, the presumption of law, even if there had been no other paper, would have been, that he never meant to finish it; or that it was intended only as a draft for consideration; and the case was still stronger as there was an executed paper.

The same doctrine is recognized by Lord Eldon in the late case of Coles *v.* Trecothic, (*r*) who thus expresses himself on the point: "The observation is just, that as to personal estate, if it appear upon the will that something more was intended to be done, and the party was not arrested by sickness or death, that is not held a signing of the will." It is, therefore, to be now understood, that not *every* scrap of paper which a man writes in contemplation of death, making mention of intended dispositions of his personal property, will be received in the Ecclesiastical Court as testamentary: it must appear that the writer intended the paper to operate as it stood when it was written, without contemplating any *further act* to be done to give to it its perfection and full authenticity; and this intention, every such paper, if it contains dispositions of personal

Of the principle on which the Courts act in receiving or rejecting informal papers.

(*r*) 9 Ves. Jun. 249.

property prospectively to the decease of the party, will be held to import, unless by its mode of expression or manner of execution, it discloses an intention in the party framing it to do some further act before he considers it complete, or means it to be operative. An intention to have the paper copied, or more formally drawn, is certainly not such further act. In the case (*s*) of the will of William Huntingdon, the late Dissenting minister of Providence Chapel in Gray's-Inn-Lane, an attorney had taken down the dispositions of his property from the mouth of the testator, and afterwards read them over to him; and the same were approved by him, and a fair copy directed to be made and brought to him the next morning to be executed as a will: but the testator died in the course of the night. Dr. Nicholl held this circumstance, of the direction to the attorney to make a fair copy, and bring it next morning to be executed, as conclusive of his having fully made up his mind on the subject of his will; and accordingly pronounced for the validity of the testamentary paper, and refused the application on the part of the next of kin to have the costs paid out of the estate.

The paper must appear to be written with the actual design of disposing after death of the property in question. There must be the *animus testandi*, which is rendered in the Touchstone, (*t*) by the expressions of "a mind to dispose—a firm resolution and advised determination to make a testament; for it is, says that book, the *mind*, not the *words*, which doth give life to the testament." Therefore, continues the same author, "if a man rashly, unadvisedly, incidentally, jestingly, or boastingly, and not seriously, write to say, that such a one shall be his executor, or have all his goods, or that he will give to such a one such a thing; this is no testament, nor to be regarded." (4) Upon the whole,

(*s*) 2 Phill. 213. (*t*) 404.

(4) A case recently decided at the Commons raised the question of the *animus testandi* upon a very singular state of facts. It was a

therefore, the mind and intention seems to be every thing—the manner nothing. Insomuch, that if a testator, by a paper, subsequent to his will, says he has

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proceeding relative to the will of T. N. deceased, an attorney, which was propounded on the part of his two children, who were the universal legatees named in it, and opposed by the widow. N. had been in habits of intimacy with K., they having frequent occasion to transact business together, the former as the solicitor, and the latter as the steward of Sir C. M. Upon these occasions they were in the habit of ridiculing the general prolixity of legal instruments, and of trying their skill in framing them with the greatest possible brevity. On the 30th of July, 1803, (the date of the will in question,) N. and K. dined together; and after dinner K. handed a paper into N.'s hands, saying, "it was his will, and asking him if it was not a valid one." N. answered, that it was a very good will, and immediately took a sheet of paper and wrote the will in question in these terms: "I leave my property between my two children; I hope that they will be virtuous and independent, and that they will worship God and not black coats." He then signed it; and giving it to K. said, "There, there is as good a will as I shall probably ever make." After he was gone, K. signed his name as a witness, and put the paper among some papers of his own. N., who was then a widower, afterwards married the defendant.

In the testator's last illness K., who stated himself to have forgotten the transaction in question, urged him to make his will, to which he answered that "he did not know but that the law would make as good a disposal of his property as he should: but that when he got better he would, in compliance with the desire of his friend, make his will."

N. died of this illness, and the writing in question was the only one of a testamentary kind found among his papers. The Judge declared himself to think that if the above facts were to be received on the evidence of K., he must pronounce against the will, as wanting the *animus testandi;* and he was of opinion that the evidence ought to be received. The evidence of such a witness, however, when in derogation of his own act, should be received, he observed, with extreme caution. The testator did not appear to intend that it should be witnessed by K., and gave no directions for its preservation. Neither did it appear that he ever made any mention of the paper in question; and his declarations, during his illness, rather indicated an intention to die intestate unless he got better. The Court, therefore, though exercising every caution as to the evidence of a witness in derogation of his own act, felt itself bound to pronounce against the will. Nichols and Nichols by their Guardian *v.* Nichols, 2 Phill. Rep. 180.

bequeathed personal property, which in fact he has not bequeathed, the paper may be proved as testamentary, and the property may pass by it. (*u*) And even an indorsement on a note, "I give this note to A.," it is said may be proved as testamentary. (*x*) In like manner if the instrument be in the form of a deed of gift, and called such in the instrument itself, still if its purpose be testamentary,—if it is only to be consummated by death, and not to operate during life, the ecclesiastical court will grant probate of it as of a will. Especially if it be not upon stamp, contains no valuable consideration, is not delivered out of the custody of the maker, and comprises no beneficial dispositions, but such as are ulterior to the death of the donor; in short, if death is the event which is to give life and operation to the instrument. (*y*) The form, indeed, is a circumstance to be regarded in conjunction with other characteristics in deciding upon the testamentary import of a paper. And if from its frame and contents it appears to have been intended as a formal permanent will, it must be presumed that the deceased meant it should so operate, unless some act should be done to revoke it. On the other hand, if the appearance of the instrument be not primarily indicative of a testamentary purpose, or has a deliberative or temporary character, the aid of circumstances will be required to give it a dispositive effect. If it contain only the expression of a wish or request, it may have the efficacy of an imperative disposition if afterwards recognised, or if such recognition, in any way commenced, be intercepted by the stroke of death. (*z*)

(*u*) 6 Ves. Jun. 397.

(*x*) 4 Ves. Jun. 565. Chaworth *v.* Beech, and see 5 Ves. Jun. 160.

(*y*) Thorold *v.* Thorold, 1 Phill. 1.

(*z*) See the case of Passmore *v.* Passmore, 1 Phill. 216: where an extract of a letter propounded as a codicil was rejected, the letter being written with erasures and alterations, embracing a variety of subjects, some trifling, some important, and the deceased having lived many years afterwards, and never recognising such letter, or making the least reference to it. And see the subsequent case of Denny *v.* Burton and Rashleigh, 2 Phill. 575. where a letter was established as

It may be useful to observe in this place, that the instrument with which, or the material on which, the writing propounded as a will is made, is not essential to its validity. But when the question is whether it contains the real and final testamentary purpose, or was designed only as preparatory to some formal operative disposition or more explicit declaration of mind and intention, the materials used may be very important, or at least of great moment in conjunction with other circumstances. In a case determined a few years ago in the Prerogative Court, a series of codicils was propounded all written with ink, except one which was written with pencil, and after a will and codicil previously made, and formally executed, both of which it must have altered and controuled, if allowed to operate. It was observed by the Court, that if the deceased had added any words expressing his intention to be finally declared by the instrument in question, though written with a pencil; or if his having written one of his codicils with a pencil could be accounted for by shewing that he had no other materials at hand, as it was permitted to the dying soldier by the Roman law to write his will in the dust, with his sword, (*a*) the pencilled paper might certainly be valid: but the paper in question, besides being written in pencil, was not expressed in the usual dispositive language of a will, and exhibited many inaccuracies characteristic rather of a loose memorandum than of an instrument intended to have a final operation; and upon these grounds the allegation propounding the paper was rejected: (*b*) but in another

a codicil, it being quite clear that the deceased intended it to be a confidential trust, not to be communicated till after his death.

(*a*) Cod. lib. 6. tit. 21. sec. 15.

(*b*) The party propounding the contested paper in the Prerogative Court supports it by a plea called the allegation, comprising a statement of the facts. This is submitted, before it is offered to the Court, to the counsel of the adverse party; who, if it appears objectionable in point of form or substance, may oppose the admission of it; and thus the suit may be terminated without going into the proof of the facts, by the rejection of the allegation, if adjudged by the Court

case (*c*) where the will of a deceased person was found in a book-case in his office regularly executed and attested, but with several alterations and erasures made in it with pencil, and contained in an inclosure with an indorsement on it, written also in pencil, confirmatory of the pencilled alterations of the instrument itself, the judge was led, by the circumstances of the case, to conclude in favour of admitting the allegation to proof: but then the instrument was found in the private repository of the deceased among other important documents and securities; it was not at hand as if he was deliberating upon it; and the alterations made were perfectly natural and reasonable under the circumstances which had taken place since the will was originally framed. A will may consist of answers to interrogatories under peculiar circumstances; as where a dying man, though of perfect capacity, may be too much exhausted to declare his intentions systematically and consecutively, it may be the best practicable mode of collecting his wishes: but, as was observed by the Court in a late case, (*d*) where such a paper was propounded, it behoves the judge to be more upon his guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition than in an ordinary case. The testamentary act in the case alluded to originated with the deceased; and was proceeded in by question and answer, on account of the extreme difficulty he experienced in the articulation of his words, and not from any want of volition. The deceased, doubtless, intended his answers to be drawn out into a regular will: but his intention being defeated by the intervention of death, they were necessarily to

to be defective in substance. If it is admitted to proof, then the allegation will require to be established by testimony, if the probate is opposed. If not further opposed, it is granted as of course. 1 Phill. 1. note.

(*c*) Dickenson *v.* Dickenson, 2 Phill. 173.

(*d*) Green *v.* Skipworth, 1 Phill. 53.; and see Swinb. Part II. sect. 5.

be regarded as instructions; and it is clear law, that if a person gives instructions for a will, and dies before the instrument can be formally executed, the instructions will operate as fully as an instrument formally completed.

It is worthy of observation, that where a testator had left five testamentary papers, inconsistent with each other, and probate of all had been granted in the Spiritual Court, Lord Eldon regretted that there was no solemnity necessary for personal estate, and observed that he thought it would be expedient to apply the provisions of the statute of Frauds to this description of property. (*e*)

Dispositions by nuncupative testaments, where the estate bequeathed exceeds the value of 30*l.*, are laid by the statute of Frauds under many restraints. The clauses of the statute relating to the matter are as follow:—

Nuncupative wills.

"XIX. And for prevention of fraudulent practices, in setting up nuncupative wills, which have been the occasion of much perjury, (2) be it enacted by the authority aforesaid, That, from and after the aforesaid four-and-twentieth day of June, no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or

Explained by 4 Ann. c. 16. s. 14.

(*e*) 5 Ves. Jun. 280. Beauchamp v. Lord Hardwicke, 4 Ves. Jun. 208.

taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

"XX. And be it further enacted, That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

"XXI. And be it further enacted, That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; (2) nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or next of kindred to the deceased, to the end they may contest the same, if they please." Probates of nuncupative wills.

Sir William Blackstone observes (*f*) that the Legislature has provided against frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse; and is hardly ever heard of but in the only instance where favour ought to be shewn to it,—when the testator is surprised by sudden and violent sickness. The testamentary words must be spoken by him with an intent to bequeath; and, as the same learned writer observes, not in any loose idle discourse; for he must require the by-standers to bear witness of such his intention. The will must be made at home, or among the family or friends of the testator, unless this is rendered impossible by unavoidable accident, to prevent impositions by strangers. It must be in his last sickness; for if he recovers, he may alter his dispositions, and has time to make a written will. It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience or surprise. Requisites.

It is to be remarked, that the words in this clause Evidence.

(*f*) Comm. Vol. II. 500.

are, that "no nuncupative will shall be good, that is not *proved by the oaths of three witnesses at the least,* who were present at the making thereof;" whereby the construction is excluded, which, as we have seen, allows the publication of a written will of lands to be established by the proof of any one of the three subscribing witnesses. Dr. Shallmer, (g) by will in writing, gave 200*l.* to the parish of St. Clement Danes: and afterwards Prew, the reader, coming to pray with him, his wife put him in mind to give 200*l.* more towards the charges of building their church: at which, though Dr. Shallmer was at first disturbed, yet afterwards, he said he would give it, and bid Prew take notice of it; and the next day bid Prew remember what he had said to him the day before, and died that day. Within three or four days after, the Doctor's widow put down a memorandum in writing of the said last devise, and so did her maid. Prew died about a month afterwards; and amongst his papers was found a memorandum of his own writing, dated three weeks after the Doctor's death, of what the Doctor said to him about the 200*l.*, and purporting that he had put it in writing the same day it was spoken: but that writing which was mentioned to be made the same day it was spoken did not appear; and the memorandums did not precisely agree.

About a year afterwards, on the application of the parish to the Commissioners of Charitable Uses, and their producing these memorandums and proofs by Mrs. Shallmer and her maid, they decreed the 200*l.* But on exception taken by the executors, the decree was discharged of this 200*l.*; and the Lord Chancellor held it not good, because it was not proved by the oath of three witnesses: for though Mrs. Shallmer and her maid had made proof, yet Prew was dead, and the statute in that branch requires not only three to be pre-

(g) Phillips *v.* The Parish of St. Clement Danes, 1 Eq. Ca. Abr. 404.

sent, but that the *proof* shall be by the *oath* of three witnesses.

A nuncupative will not pleadable till probate.

Until probate has been obtained of a nuncupative will, it cannot be set up in pleading against the administrator, as appears by the case of Verhorn *v.* Brewen, (*h*) where an administrator brought a bill to discover and have an account of the intestate's estate; and the defendant pleaded, that the supposed intestate made a *nuncupative will,* and another person executor; to whom he was accountable, and not to the plaintiff, as administrator. But it was decreed, that though there were such a nuncupative will, yet it was not pleadable against an administrator before it was proved.

A written will not to be altered by a nuncupative disposition.

No nuncupative disposition, though made and published with the due formalities prescribed by the 19th and 20th sections, can make any alteration in a written will, by reason of the restriction in this particular contained in the 22d clause of the statute. Yet if a legacy given by a written will has lapsed, or was void for some legal objection, such legacy might be the subject of a nuncupative disposition. Thus, where one G. S. (5) on the 2d of September, 1679, made his will in writing, and appointed E., his wife, his executrix, and gave all the residuum of his estate, after some legacies paid to her, and the wife died in the testator's lifetime, who afterwards made a nuncupative codicil, and gave to another all that he had given to his wife, and died, and the single question was, whether this nuncupative codicil was allowable, notwithstanding the 22d section of the statute of Frauds; it was resolved by Sir Hugh Wyndham, Justice, Sir Thomas Raymond, and several civilians joined in the commission, that the nuncupative codicil was good; for, by the death of the wife before the testator, the devise of the residue was totally void, and so there was no will as to that part.

(*h*) 1 Chan. Ca. 192.

(5) Sir Thomas Raymond, 334. before the Delegates at Serjeants' Inn, December 9, 1679.

The nuncupative codicil was, therefore, in the foregoing case, a new disposition as to the residue; because, as to so much there was no will, its operation being determined. And it was objected, that, by the same reason, if any part of a will in writing was made by force or fraud, the thing so given and specified in that part may be devised by a nuncupative codicil, and so the will might be altered contrary to the words of the statute: but it was answered by the Court, that if such part of a will were *so* obtained, it would be no part of the will, and so such codicil would be no alteration of what was not, but would be an original will for so much. And they further said, that if A. be possessed of an estate of 1000*l.*, and by will in writing, gives a part of it, as 500*l.*, to B., he may give the residue by a nuncupative will, so as he does not change the executor.

Rogatio testium. The dying person is required by the statute to bid the persons present bear witness that such is his will, or to that effect. And the statute with respect to this as well as its other requisitions, has always been strictly construed. Thus in a late case (*i*) where a person in her last sickness called her children to her bedside, together with another individual who was in the house, and declared to them her wishes as to the disposition of her property, without more in the case, though the credit of the witnesses was unshaken, the paper propounded as nuncupative was rejected for want of the *rogatio testium*, which ought to be explicit and positive.

It has been held that a disposition, not valid as a nuncupative will, for want of the observance of the formalities required by the statute, may be supported as a trust in equity. The case cited in support of which proposition, is that of Nab *v.* Nab, (*k*) where a daughter, having deposited 180*l.* in the hands of her mother, made her will, and gave several legacies, and made her mother executrix, but took no notice of the 180*l.*; but afterwards, by word of mouth, desired her mother, if

(*i*) Bennett *v.* Jackson, 2 Phill. 190.
(*k*) 10 Mod. 403. Gilb. Eq. Rep. 146.

she thought fit, to give the 180*l.* to her niece; and on a bill filed by the niece for this sum, it was proved in the cause, for the plaintiff, that the daughter, after making the will, had said, she had left her niece 180*l.* as a legacy, but the parol declaration of the daughter appeared only by the answer of the mother upon oath.

It was agreed that this was not good as a nuncupative will, being above 30*l.*, and not reduced into writing within six days after the speaking, as the statute of Frauds requires. But the mother was decreed to be a trustee for the niece. I find no other case that comes up to this doctrine; and, perhaps, the courts will not hereafter, if the point should arise, be disposed to be guided by a single precedent so opposed to that feeling of regret which of late they uniformly express at being forced into a departure from the plain and wholesome provisions of the statute by the stress of authorities.

By the 23d section of this statute, soldiers in actual military service, and mariners at sea, are excepted out of the clauses restraining the testamentary power in respect to personal estate. Soldiers may still, therefore, make nuncupative wills, or revocations of personal estate; and dispose of their goods, wages, and other chattels, without the forms required by the law in other cases. And by statute 5 W. 3. c. 21. s. 6. the probate of any common soldier was, and continues to be, exempted from the duties imposed by that act. With respect to seamen, however, the power of making nuncupative wills left to them by the statute of Frauds in the unfettered state in which it stood previously to that statute has been laid under restrictive provisions by subsequent enactments for their better security and protection against fraud and imposition. The regulations which regard this object will be found in the statutes 26 G. 3. c. 63. and 32 G. 3. c. 34.

This section may be concluded by observing that the production of all papers of a testamentary nature will be compelled by the Prerogative Court which, upon application, will direct a monition for that purpose to

the party having any such in his possession. Nor will it be a sufficient ground, by way of objection, to say that the paper in question was never seen by the deceased. (*l*) It is enough if there is a possibility that the paper might be of a testamentary character.

(*l*) Langmead *v.* Lewis, 2 Phill. 325.

PART II.

EFFICACY OF WILLS.

CHAP. I.

Disposing Efficacy.

UNDER this head will be considered what subjects a will may operate upon, and in treating of these topics, no regard will be paid to the questions anciently arising upon the statutes of Henry the Eighth, respecting the restrictions as to lands held by knight's service *in capite*, and the other points discussed in the once great case of Leonard Lovie, (*a*) which may now be safely left to the researches of learned curiosity.

Among the subjects on which a will may operate we shall treat first of things real, or hereditaments, with their several kinds, then of contingent and executory estates and interests.

SECT. I.

Freehold Hereditaments.

THE import and extent of the words "estates of inheritance" made use of in the first statute of Wills,

(*a*) 10 Rep. 78.

32 Hen. 8. c. 1. being open to doubt, for clearing this and other ambiguities of construction, the 34th and 35th of the same reign were passed. That statute, reciting the said doubts as to the exposition of the former statute, enacts in the third section, "that whereas it is contained in the former statute, that all and singular the person or persons, having any manors, lands, tenements, or hereditaments of an estate of inheritance, should have full and free liberty, power, and authority, to give, will, &c. as well by his last will and testament in writing, as, &c. his manors, lands, tenements, or hereditaments, or any of them, in such manner, &c. the words 'estate of inheritance' should be expounded, taken, and judged of estates in fee simple only." And in the fourth section of the last mentioned statute, it was provided that "all and singular person and persons, having a sole estate, or interest in fee simple, or seised in fee simple in coparcenary, or in common in fee simple of and in any manors, lands, *rents* or other hereditaments in possession, reversion, remainder, or of rents or service incident to any reversion or remainder, and having no manors, lands, tenements, or hereditaments holden of the King, his heirs or successors, or of any person or persons by knight's service, shall have full and free liberty, power, and authority, to give, dispose, will, or devise to any person or persons, &c. by his last will and testament in writing, or otherwise by any act or acts, lawfully executed in his life, by himself solely, or by himself and others jointly, severally, or particularly, or by all those ways, or any of them, as much as in him of right is, or shall be, all his manors, lands, tenements, rents, and hereditaments, or any of them, or any rents, commons, or other profits or commodities out of, or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure.

What things are devisable by the statute of Wills.

These statutes have been construed not to extend to things devisable by custom; and the distinction to be regarded in this respect is this,—that the custom, which

must be its own interpreter, is for the most part general, "that every one seised of lands may devise," whereas the statutes are confined in expression to manors, lands, &c. holden in fee simple; so that where such custom existed, lands held for the life of another were devisable, whereas, not being within the purview of the statutes of Henry the Eighth, they continued not devisable, unless in virtue of such custom, till the statute of the 29 Car. 2. c. 3. s. 12. subjected them to the testamentary power in the mode therein prescribed. And it has even been considered as doubtful whether where such a custom for devising existed, an estate for the life of another was within the operation of the last mentioned statute, so as to be subject to the restrictions with which the power thereby created was coupled.

Of the distinction between valuable and not valuable.

It has been said also that, upon the sound construction of the statutes of Wills, things of which it cannot be predicated in a legal sense, that they are of a certain annual value, were not within their contemplation; for the statute 32 Hen. 8. enacts, that "every person having manors, &c. held, &c. by knight's service, might devise two parts of his hereditaments in three parts to be divided, or so much as amounted to the *annual value* of two parts of them in three parts to be divided in certainty, and by special division, so that it might be known in severalty for the advancement of his wife, &c. and saving to the King the custody of so much of the inheritance as amounted to the *real annual value of the third part.*" And the statute 34 Hen. 8. provides that, "if the hereditaments that descended to the heir after such devise did not extend to the clear yearly value of the third part, the King might take so much of the residue of the tenements as should make the *value* of the third part with the full profits thereof;" from which expressions of these statutes it was to be inferred that they were not intended to embrace such inheritances and things as were in their nature entire, and could not be divided into proportional parts, nor to such as were not of any certain annual value. And such appears to have been the opinion of Lord

Coke, who cites in support of it the reasoning of Prisot, J. in a case of 32 Hen. 8. c. 22.; from whom he derives the position, that when the law requires the value of a thing to be mentioned, it must be intended of a thing of a certain yearly value; and concludes that as the statutes of Wills authorise the devise of hereditaments held *in capite* valuable and devisible, none but such can by virtue of those statutes be devised, and consequently that the franchise of *bona et catalla felonum* or *fugitivorum*, not being valuable, are therefore not devisable by themselves.

Titles of honour.

Titles of honour, where they are personal, and not territorial, as is now almost universally the case, being limited to the descendants of the person ennobled, fall under this class of undevisable things. And the same may be said of ways and commons, when not annexed to other property so as to pass incidentally. Offices also, and corodies, are among the things not devisable, when attached to the person; for of all these subjects it may be observed, that when they are appendant or annexed to lands and possessions, they will pass together with such devisable property. An advowson is intended under the word "tenements" in the statute; it is departible as between coheiresses; dower may be assigned thereof; it is valuable; and will pass by the word "tenements" or hereditaments. So also the next turn or presentation is a thing devisable, and passes as a valuable legal interest; and by the devise of an advowson the next presentation inclusively passes.

Rents.

Rents are likewise devisable by the express words of the statute 34 Hen. 8., though the previous statute 32 Hen. 8. did not comprehend them. Tithes are included under hereditaments, and manors are expressly contained in the statutes. Franchises also may pass if in their nature valuable, and not restrained to the person of the grantee, and his heirs; and if not in themselves valuable in legal consideration, they may still pass by devise as appurtenant to other things to which that character belongs.

These distinctions, however, between things valuable

and not valuable, have scarcely now any real existence, the state of commercial interchange having produced a great alteration in these respects. In Butler and Baker's case, (*b*) a principle is recognised from which we may infer that wherever such casual hereditaments, though not strictly valuable in themselves, have been turned to valuable account by being usually let to farm for a yearly return in rent, they may be devised within the purview of the statutes.

SECT. II.

Copyhold Hereditaments.

COPYHOLDS are not within the statute of Wills. The statutes of Hen. 8. for the full exercise of the testamentary power required the tenure to be in socage, a description not applicable to copyhold tenure. Copyhold estate could not, for another reason, be considered as within the view of those statutes, since their purpose was to revive the testamentary power with certain qualifications and restrictions, after the statute made for carrying the possession and legal estate to the use had either suppressed its exercise, or driven it upon new expedients for its preservation. But the statute of Uses had not interfered with the uses raised upon surrenders, those being properly executed by the admittance, which was in the nature of a new grant by the lord in pursuance of the surrender. Nor, indeed, were copyholds, properly speaking, ever devisable, for a will could have no effect upon them as a will; so that it was always necessary first to pass the estate by a surrender thereof into the hands of the lord, to such uses as the surrenderor should by his last will appoint, and then his will succeeded to the surrender as an appoint-

(*b*) 3 Rep. 32.

ment or declaration of the uses or purposes thereof. But though a will of copyhold has been said to work as a declaration or appointment of the use only, yet it has always partaken of the quality of a will in many essential particulars. It is revocable as a will in all respects, and is altogether an ambulatory instrument until the death of the maker. So that if the appointee die in the lifetime of the testator, the devise fails; for the act remains incomplete, and the instrument is without operation, and mute, until the testator's decease.

By the statute 55 Geo. 3. c. 192. it is enacted, that "in all cases where, by the custom of any manor in England or Ireland, any copyhold tenant of such manor may by his or her last will and testament dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made, or to be made, by any such last will and testament by any person who shall die after the passing of this act, of any such copyhold tenements, or of any right, title, or interest, in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will. After saving the duties, fines, and fees, as the same were before payable, the statute provides that nothing therein contained shall render invalid any devise or disposition of copyhold which would have been valid if the new act had not been made, nor render valid and effectual the devise or disposition of any copyhold lands which would be invalid or ineffectual if a surrender had been made to the use of the last will and testament of the person attempting to dispose of the same by will."

In the above act the Legislature has shewn a solicitude to leave every thing in its former state and condition, both as to the parties and the instruments, save only the dispensing with the previous surrender to the

use of the will. The nature of the disposing instrument, though it cannot be a declaration of the purposes of a surrender previously made, as formerly, is not substantially changed; it is an appointment of the person to be admitted to certain uses declared, who accordingly takes immediately from the lord by grant. And the same description of instrument, which would have been effectual before the act, continues to be valid in virtue of the express provision of the third section thereof.

SECT. III.

Vested Interests.

Fee simple estates, and their several sorts.

WE are next to consider to what estates and interests the power of devising extends. The statutes expressly allow it to those only who have fee simple estates; whereas, where the disposition by devise was warranted by custom, the qualification was general, consisting merely in being seised of the land. Every estate, however, which the law considers as a fee simple was devisable by the statutes; the several sorts of which are defined in Plowden. (c) The fee simple absolute is the estate in lands vested in a man and his heirs, without any determination limited, or condition annexed. The fee simple determinable is the estate which a man holds to himself and his heirs, bounded by the duration of some extrinsic matter or thing; as if land be given to one and his heirs, as long as he shall continue to perform something, or pay a certain sum, or as long as a particular tree or church shall stand; in which cases the whole estate in the land is held and enjoyed in possible perpetuity, entire while it lasts, and subject only to be determined by an event extraneous to its

Absolute.

Determinable.

(c) 557.

Base fee.

own constitution. The base fee is where there is an infirmity in the creation and constitution of the estate which subjects it to be determined by the supervention of a better title. As where a tenant in tail bargains and sells his land, and then levies a fine to the bargainee, there such bargainee has a base fee, but which from an infirmity in its nature can last only as long as there are heirs of the body of the tenant in tail; or as where a donee in tail is attainted of treason, in which case the Crown shall have the land as long as there are heirs of the body of the donee. We shall say nothing of the fee simple conditional, which, had it remained as at common law, would have undoubtedly been devisable within the statutes above referred to; and content ourselves with observing that the fee simple intended by those statutes is to be understood in the largest sense, as embracing all estates in fee simple, whether unrestricted or determinable, absolute or conditional; in opposition to estates of freehold, or in fee tail. A fee simple may be in possession or out of possession; and it may be out of possession by being turned to a right, in which case it has been before shewn to be not devisable; or it may be out of possession by the interposition of some estate or interest of another, whereby the right of actual or immediate enjoyment is suspended; and this is when it takes the name of a reversion or remainder, either vested in interest, or limited to take place upon some contingent condition or event, which renders its vesting a matter of doubtful expectation.

Reversion and remainder.

It has been contended that a reversion upon an estate tail, though a vested interest, was not to be considered as valuable, so as to be within the statutes of Henry the Eighth, so long as the estate tail endured; but it was resolved in Leonard Lovie's case, (*d*) that there was a difference between things which of their nature were not of any annual value, and such as by their nature were of annual value, though the actual profit was

(*d*) 10 Rep. 78 *a*. Hob. 13.

postponed by the grant or limitation. (*e*) And the same reasoning holds with respect to a remainder upon an estate tail, which is also devisable within the above mentioned statutes. They both come within the descriptive terms used therein, the reversion being an estate in fee, and a present interest, though detached from the possession by the particular estate which has been carved out of the fee; and the remainder being that which is parted with at the same time with the particular antecedent estate, and is limited over to take effect in succession.

Equitable estates.

Equitable estates, which are those from which the legal estate is detached, or which are held in trust for the person or persons beneficially entitled, generally for carrying into effect certain particular objects or provisions, are within the devising power, as well as their correspondent legal estates, to the extent of the devisor's interest therein: for before the statute 27 Hen. 8. annexed the possession to the use, and thus created a necessity for the statute of Wills, uses were the means by which the devising power was made effectual; and since the statute of Uses, trusts, which have their operation under the sanction of the courts of equity, have come into their place.

Title by contract.

The interest in a trust, or a mere claim in equity, as the benefit of a contract, is also disposable by will. Thus A. being seised of New River shares, conveyed the same to trustees in trust for himself and his wife, during their respective lives; and after the decease of the survivor, then out of the rents and profits to pay his debts, and the portions of his daughters; and after such payments to permit H. and his heirs to receive the rents and profits of the premises. A. and his wife died; H. contracted with B. to sell to him some of the said shares; and the contract not being performed, B. exhibited his bill against H., to compel the performance of the agreement. After some proceedings in the

(*e*) And see Beddingfield's case cited, 10 Rep. 81 *b*. and Winsmore *v.* Hobert, Hob. 313.

suit, B. died, having first devised the benefit of his contract to C., and her heirs; and on a bill filed by C., it was insisted, that the plaintiff had no title to have the benefit of the contract, it being a thing in action, and therefore, it was said, not devisable: but Wyld and Raymond, Justices, the Master of the Rolls, and the Lord Keeper, held, against the opinion of Wyndham, Justice, that it was an equitable interest, and that an interest in a trust was in equity assignable or devisable. (*f*)

SECT. IV.

Contingent and Executory Interests.

These interests are devisable as well as transmissible by descent.

WE have seen that reversions and vested remainders are devisable within the above mentioned statutes of Wills. We may safely now assume that this is also the general doctrine with respect to contingent remainders of inheritance, which, as they are transmissible by descent to the heirs of the grantee in the event of his dying before the happening of the contingency, so are they capable, while in this state of suspense, of being transmitted by devise under the same statutes. This is now a clear point, and may be regarded as having been settled by the case of Roe on dem. Perry *v.* Jones; (*g*) though, as appears by the case of Bishop *v.* Fountain, reported in Levinz, (*h*) a different opinion once prevailed, grounded on the construction of the word "having" in the statute of Wills, as importing the same legal sense as the words "seised of," which could be properly said only of such as had vested

On the construction of the word "having" in the statute of Wills.

(*f*) Combury *v.* Middleton, 1 Cha. Ca. 173. 208.
(*g*) Blackst. 30, 34.
(*h*) 3 Lev. 427. and see Ives *v.* Legge, 488. in note.

interests in the subject. But the word "having" in the statutes above mentioned is now understood as satisfied by the devisor's having an interest in the thing however precarious. Thus in Roe *v.* Griffith, (*i*) it was said by Lord Mansfield, that in Selwyn *v.* Selwyn (*k*) he was prepared to have shewn, with the concurrence of all his brethren, that all contingent, springing, and executory uses, where the person who was to take was certain, so that the same might be descendible, were also devisable, adding that these were convertible terms.

When the person designated is uncertain.

This distinction between the cases where the person designated is certain, and those wherein he is unascertained, and a part of the contingency, is well illustrated in the late case of Doe on dem. Calkin *v.* Tomkinson and Others, in the King's Bench, (*l*) in which the case left by the verdict for the opinion of the Court was to the effect following:—

"On the 7th of September, 1802, John Tomkinson being seised in fee of the premises in question, by his will, after directing his debts and funeral expenses to be paid, devised thus:—'My will and desire is, that all my real and personal estate wheresoever and whatsoever be left equally to my sisters, Mary and Elizabeth Tomkinson, of Forsbrooke, or to the survivor of them, and to be disposed of by the survivor, as she may by will devise,' and made his said sisters his executrixes. The testator died in 1810, leaving the said Mary and Elizabeth (who thereupon took possession of the estate) and also another sister, Anne, him surviving. Afterwards, on the 9th of July, 1810, Mary made her will, and thereby devised all her messuages, lands, tenements, hereditaments, and real estates whatsoever, situate at Forsbrooke, or elsewhere in the county of

(*i*) 1 Blackst. 605.

(*k*) 2 Burr. 1131. sent by Lord Northington, C. for the opinion of the Court of King's Bench. See also Moor *et ux.* *v.* Hawkins, 1765, cited H. Blackst. 33, 4.

(*l*) 2 Maule and Selwyn 165.

Stafford, to her sisters Elizabeth and Anne, successively for life; and from and after the decease of the survivor of them, she devised all such part of her real estate as was devised to her by the will of her late brother J. Tomkinson, to the defendants, their heirs and assigns, as tenants in common, and not as joint tenants. Elizabeth Tomkinson was living at the time when Mary made this will. Mary survived both E. and A. Tomkinson, but died without having re-published her will. The lessors of the plaintiff, Jane, Anne, and Sarah, were the heirs at law of Mary, and also of John, Elizabeth, and Anne Tomkinson.

"The question for the Court was, whether the plaintiff was entitled to recover: if the Court should be of opinion that he was entitled, the verdict was to stand; if not, a nonsuit was to be entered.

"The Judges were of opinion that the above devise did not create a tenancy in common in fee, on account of the words 'to the survivor;' and supposing the devise to have carried a contingent remainder to the survivor, it could not be considered as devisable, because the person who was to take was not in any degree ascertainable before the contingency happened. It could not be said in whom the interest was, during the lives of the two sisters, nor, consequently, that it was in either of them during that period; and it was only in the event of survivorship that it was to become certain. Admitting, therefore, the enlarged construction put on the statute of Wills by Lord Kenyon and the other Judges in Roe *v.* Jones,—how could a person be said to have a contingent interest, when it was uncertain whether he was the person who would be entitled to have it or not? It was not given to a designated person to be executed upon a contingency: but to a contingent person. Therefore, without determining what the precise estate given was, it appeared sufficient to say that the defendants were not entitled."

The descendible quality of these estates had long before been settled,—a doctrine fully recognised in the

case of Weale *v.* Lower, (*m*) and it will be seen by reference to Wood's case, cited in Lord Coke's Reports, (*n*) to have been equally the law with respect to future uses. If, however, the existence of the devise be a part of the contingency itself, on which the limitation is made to depend, such expectancy cannot by the terms of its creation be either descendible or devisable, if the limitee die before the contingency happens. (*o*)

In the above mentioned case of Roe *v.* Jones, (*p*) Lord Loughborough observed, that taking it to be a springing contingent executory use, they were all of opinion that it was devisable, and passed by his will: and when the same case came on in the Court of King's Bench, (*q*) Lord Kenyon observed, that the statute which enabled persons 'having' any manors, lands, &c. to devise, must mean, having an interest in the lands; and the true line of distinction was there taken by his Lordship between a contingent interest or a possibility coupled with an interest, and a mere naked possibility, like the hope of succession, or the simple expectation or prospect which an heir at law has of inheriting from his ancestor. The Chief Justice then expressed a hope that the point would be understood to be fully at rest. And so it may be considered with the exception of the cases above alluded to, where the person to take in virtue of the contingent limitation not being individually ascertained, nor ascertainable till the contingency arrives, the estate cannot be transmissible by descent or devise till the object of the executory limitation is decided by the event. As where there is a contingent or executory limitation to the right heirs of A., he being in existence at the time of such limitation, in which

(*m*) Pollexfen 54. (*n*) 1 Rep. 99 *a*.

(*o*) Moorhouse *v.* Wainhouse, 1 Blackst. 638. The mode of transferring the benefit of these contingencies *inter vivos* must be by estoppel, which a fine has the effect of creating. See the before cited case of Weale *v.* Lower, Pollexfen 54.

(*p*) 1 H. Bl. 30.

(*q*) 3 T. R. 88.

case during the life of A., it must remain uncertain who will be his heir; and, consequently, so long as A. lives the contingent interest cannot be said to be in any body, through whom it can be transmitted, or under whose will it can pass.

The doubts, as we have seen, respecting the devisability of contingent and executory interests in real estates, seem in a great degree to have arisen from too narrow a construction of the statutes of Wills: but no such question of construction could affect testamentary dispositions of contingent or executory interests in terms of years, and other personal or chattel estates. Wherever such possibilities or future interests have been accompanied with an interest, they appear to have been always, or at least in very early times, proper subjects of the testamentary power. (*r*)

(*r*) 2 Roll. Rep. 129. 4 Rep. 66 *b*. 10 Rep. 50 *b*. 11 Mod. 127. Moor 806. Pollex. 44. 2 Freem. 250. 2 P. Wms. 572. *Id.* 608.

CHAP. II.

CREATIVE EFFICACY.

SECT. I.

Remainders.

HITHERTO the disposing efficacy of wills has been treated of, we are now to enter upon the consideration of their creative efficacy; or, in other words, the estates and interests which they are capable of forming and effectuating.

The owner of an absolute fee simple in lands, whether in possession, reversion, or remainder, may doubtless dispose of such entire interest by his will, and of any other estate in fee less than an absolute fee simple; and annex to the same any lawful condition. He may carve out of such absolute estate in fee simple a determinable fee. Thus he may devise his lands to his eldest son, until his youngest son come to the age of twenty-two years, by which he will give to his eldest son a fee simple in the lands till his youngest son attain to the age prescribed. (*a*) And such absolute owner of the fee simple may create an estate within the statute *De Donis Conditionalibus,* called an estate tail; and if he devise his lands to one, and the heirs of his body, he may create remainders after such estate, either vested or contingent: but he cannot limit a fee to take place after a fee; nor could he have added such a limitation even after a fee simple conditional before the statute *De Donis;*

Origin of the estate tail.

(*a*) Gates *v.* Holywell, 3 Leon. 216.

for before that statute all that existed in the donor, after granting such an estate, was a possibility of reverter upon the condition failing, out of which no remainder could be limited; therefore, if a man before the statute *De Donis Conditionalibus*, granted lands to one, and the heirsof his body, and in default of such issue to another and his heirs, such grant over would have been void. But the nature of these conditional fees were altered by the statute last alluded to, by force whereof the donor by such gift to one, and the heirs of his body, divides the fee into an estate in the donee, called a fee tail, being a carving thereout, and the residue or remainder thereof; which is left in himself as an estate expectant upon the determination of the interest so parted with by the ultimate failure of issue of the body of the alienee. Before the statute, the condition was performed by having heirs of the body, and the estate of the donee thereby became absolute: but, in virtue of the same statute, the gift became substantiated, and fixed in the lineal heirs of the donee; so that if A., having lands in fee simple, devised the same to B. for his life, remainder to C. and the heirs of his body, remainder to D. for his life, such ulterior limitation took effect out of the reversion expectant upon the preceding estate in fee tail. Thus the tenant in fee, after any devise of a less estate, whether for life or in tail, might go on to limit, out of his remaining interest, an estate in fee, or any other estates to take effect in succession after the preceding limitations, till his interest in the whole fee was exhausted.

Proper character of a remainder.

There cannot be a more apt form of expression to create a remainder than the word "remainder;" and to sustain a limitation as such a particular estate must be made to precede it, which, if it be a contingent remainder, must be in existence till the moment in which the contingent estate becomes vested in possession, or in interest; for the rule is, that every remainder must vest either during the continuance of the prior estate, or in the same instant as that in which such prior

estate determines: and the person to whom the remainder is limited must be either at the time of the limitation capable of taking it, or such a one as may in the ordinary course of things be capable when the contingency may happen.

It would be in contradiction to the nature of a remainder, to suppose it limited after a fee; for Lord Coke defines a remainder to be "a remnant of an estate in lands or tenements, expectant upon a particular estate, created together with the same at one time;" and this is the nature of a remainder, whether vested or contingent; it is that which remains of the fee after a particular estate has been carved out of it.

At common law there were two sorts of particular estates—an estate for years, and an estate for life: but by the statute *De Donis* another sort of particular estate, the estate tail, was introduced, leaving, as has been already explained, a reversion, or remnant of the fee in the donor, which is always to be distinguished from a possibility of reverter, and from a right of entry for a condition broken.

To satisfy the above definition of a remainder, it follows that one or other of these descriptions of a particular estate must first be carved out of the fee. If land be conveyed or devised to A. for his life, and after A.'s decease to B. and his heirs, the estate vests in interest, though not in possession, and is therefore a proper vested remainder in B. And this answers Lord Coke's definition; for B.'s remainder passes from the grantor at the same time as A.'s life estate in possession. But if land be conveyed or devised to A. for life, and if B. die in the lifetime of A., then after A.'s decease, to C. and his heirs, C.'s estate is contingent during the life of A. and B.

To be a true remainder, it must exist in lands and tenements, and not chattel interests, which are not the proper subjects of remainders in law. And to be a good *contingent* remainder, it is a rule that some vested estate of freehold must precede it; which rule arises from the necessity there is for the freehold to pass out

of the grantor at the time that the remainder is created. If I limit an estate to the use of A. until C. return from Rome, and after the return of C., to the use of B. and his heirs; A., in this case, has a particular estate which is to last till C.'s return, which being an uncertain period, such particular estate in A. is a freehold, for it *may* last for his life, and the residue of the estate after C.'s return is a remnant of the fee expectant upon the particular estate: but as C.'s return from Rome is an uncertain event, the limitation of such remnant over being dependent thereupon, is a contingent remainder.

Contingent remainders, how constituted.

Mr. Fearne has distinguished contingent remainders into four sorts:—

First, where the remainder depends entirely on a contingent determination of the preceding estate itself; as if A. make a feoffment to the use of B. till C. return from Rome, and after such return of C., then to remain over in fee, here the particular estate is limited to determine on the return of C.; and only on that determination of it is the remainder to take effect: but that is an event which possibly may never happen, and therefore the remainder, which depends entirely upon the determination of the preceding estate, is dubious and contingent.

Secondly, where some uncertain event, unconnected with, and collateral to, the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder; as if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life. So if lands be given to A. in tail, and if B. come to Westminster-hall such a day, to B. in fee; here B.'s coming to Westminster-hall has no connection with the determination of A.'s estate: but as it is an uncertain event, and the remainder to B. is not to take place unless it should happen, such remainder is therefore a contingent remainder.

Thirdly, where a remainder is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate; (and it is neces-

sary that some preceding freehold estate should subsist and endure till the contingency happens, though a remainder may be so limited as not to vest till the very instant at which the preceding estate determines:) as if a lease be made to J. S. for life, and after the death of J. D. the lands to remain to another in fee; now it is certain that J. D. must die some time or other, but his death may not happen till after the determination of the particular estate by the death of J. S., and therefore such remainder is contingent. So in a case of a lease for life to A., and after the death of A. and M., the remainder to B. in fee, this is a contingent remainder; for the particular estate being only for the life of A., and the remainder not to commence till after the death of A. and M., if A. die before M., the particular estate will end before the remainder can commence, which is very possible, and therefore such remainder is contingent.

Fourthly, where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made; as if a lease be made to one for life, remainder to the right heirs of J. S.; now there can be no such person as the right heir of J. S. until the death of J. S. (for *nemo est hæres viventis*) which may not happen till after the determination of the particular estate by the death of tenant for life, therefore such remainder is contingent.—So where a remainder is limited to the first son of B. who has no son then born; B. may never have a son; or if he should, the particular estate may determine before the birth of such son; therefore this remainder is contingent.—So if an estate be limited to two for life, remainder to the survivor of them in fee, the remainder is contingent; for it is uncertain who will be the survivor.

It is a necessary property of a remainder to vest in possession on the regular expiration of the estate previously limited. If the event on which the subsequent estate is made to depend, is to have the effect of abridging the period of its assigned duration; such subsequent estate is no remainder at common law, and can

only be effectual as a springing use, or an executory devise. Thus if land be limited to A. for his life, with a proviso that if C. die in the lifetime of A., the estate of A. shall cease, and the land shall vest in B. and his heirs, this is a contingent limitation to B., but not a remainder, for a remainder is what is limited to come after, or at the end of what is previously created, and not in lieu or in the place of it. Thus if land be limited to A. for life, and after his decease to B. and his heirs, B. has during the life of A. a vested estate or remainder which awaits the regular expiration of A.'s estate: and which upon the death of A. vests in B. in possession. (*b*) And if land be limited to A. for life, and if C. should die in A.'s lifetime, then upon the decease of A. to B. and his heirs. B. during the joint lives of A. and C., has a contingent remainder, which on the death of C. in A.'s lifetime becomes a vested remainder in B.: but without determining, or in any manner affecting, the life estate of A.

The case above supposed of a limitation to A. for his life, with a proviso that if C. die in his lifetime, the estate of A. shall cease, and the land become vested in B. and his heirs, is to be distinguished from the case of a limitation to A. until C. return from Rome, and upon C.'s return from Rome, to B. and his heirs, which, according to Mr. Fearne, belongs to that class of remainders which depend upon the contingent determination of the preceding estate.

To understand the distinction more clearly, we must consider that in the case last above surmised, the estate is by the terms of its original creation limited to endure till a certain event, which is assigned as its boundary, and makes a part of its very essence and constitution. Thus the return of C. to Rome is the

(*b*) It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for if so, the remainder to B. in the above terms, would be contingent. It is the present capacity of taking effect in possession, if the possession were to become vacant, which distinguishes the vested remainder from one that is contingent. See Fearne Cont. Rem. 149.

regular determination of the estate according to the prescribed measure of its existence, and the quality of the thing itself, which was made to last only till that event; and the particular estate being limited to endure for an uncertain period, is an estate of freehold, and the residue of the estate after C.'s return is the residue of the whole estate in the lands expectant on that particular estate; and if that remnant is given to B. and his heirs, B. has a contingent remainder of the fee.

It is the same in result, if an estate be limited to the use of A. and the heirs of his body, until a particular event happens, as until C.'s return from Rome; for here only a part of the whole estate is given to the first taker, that is, an estate tail determinable on C.'s return from Rome; the residue therefore after C.'s return is a remnant of the estate expectant upon that event, and may be disposed of as a remainder, strictly within the legal meaning of the term: but contingent, inasmuch as its taking effect is dependent upon an uncertain event. Wherever in short the determining event enters into and is an intrinsic ingredient in the limitation itself, qualifying its capacity of enduring, supposing the estate, which is the subject of the limitation, to be of a denomination to admit of limitation after it, the interest limited over on such event falls properly within the definition of a contingent remainder. Thus a limitation to A. for his own or another's life, if he shall so long continue unmarried, or to A. and the heirs of his body, if he or they shall so long continue lords of a particular manor, are determinable estates consistent with a limitation over at common law, which limitation over being made to depend upon uncertain events are properly, and in the strictest sense, contingent remainders. But these events are incorporated into the original estates, and qualify and determine their capacity of endurance. But if the land be limited to A. for his life, with a proviso that if he marries, his estate shall cease, or to A. and the heirs of his body, with a proviso that he or they

shall cease to be lords of such a manor, his and their estate shall be determined; there the event is not incorporated into the limitation as a modification of its original capacity, but operates upon it *ab extra* to curtail its existence, and thus anticipating the period of its natural exhaustion.

Again, if an estate be limited to A. and his heirs until C. returns from Rome, and after the return of C. to the use of B. in fee, such limitation over cannot take effect as a remainder, and can only be effectual as a conditional limitation, if by deed, or as an executory devise, if by will, of which we shall say more hereafter. For an estate limited to A. and his heirs until a particular event shall happen, as until C. shall return from Rome, and then to vest in another, is properly an estate in fee simple of the class which is called determinable. It may become absolute on the death of C. before his return from Rome; and on C.'s return from Rome, it will cease by its original qualification: but though it is true that the determining quality is a part of the original limitation, as in the cases above supposed, still we are to remember that the law regards such determinable fee as the whole fee, as long as it may last, and so there can be no proper remainder engrafted upon it, because there is no remnant of the estate of which a remainder can be constituted.

If an estate be limited to A. until C. returns from Rome, and after the return of C., or the decease of A. to remain over to B. and his heirs, in such a case B. has a vested, not a contingent remainder; for the estate would come to him in either event. Here the remainder is so limited as to take effect on the determination of the particular estate, whether such contingency happened or not. Though by a particular event it may be accelerated; yet, upon the expiration of the first estate, it must take effect, and therefore it is an estate vested in interest during the life of A. (*b*)

(*b*) Co. Litt. 225. *a*.

But if an estate be limited to A. until C. shall return from Rome, and on C.'s return from Rome to B. in fee, A. takes an estate which will expire on his own decease, and may expire before his decease, by the return of C. from Rome. If it expire by C.'s return from Rome, B. will have the land: but if it expire by the death of A. before C. returns from Rome, B. will not have the land; therefore the succession of B. to the estate depends upon a contingency. In the case of a devise by a testator to his wife for her life, if she shall so long continue his widow, and if she shall happen to marry again, then to another in fee, though for the reason above adverted to such remainder over would appear to be contingent, as the previous estate may terminate in two ways, by death or marriage; and the remainder is in expression limited so as to depend on marriage only; still the courts have referred such equivocality to mere inadvertence, and have determined on the plain ground of intention that the remainder shall take effect either on the death or second marriage, so that the same must be regarded as a vested remainder. (c)

Where a limitation is made to depend upon two events, one of which *must* happen, it is a vested remainder.

If we suppose an estate devised to A. for life, remainder to B. in fee, provided that if certain other lands should descend to A., then the estate of A. should cease, and the limitation over should immediately take effect, here the contingent limitation over is to take effect in exclusion of a part of the preceding estate, and cannot therefore, without confounding the qualities of things, be considered as a residue or remainder. It must be classed among conditional limitations, void at common law, in direct conveyances by immediate feoffment or grant, though good and available as executory devises, and effectual also through the medium

(c) Luxford v. Cheeke, 3 Lev. 125. So in cases similarly circumstanced, where the estate has been personal, the construction has been that the object of the limitation over upon the widow's marrying again, should be entitled upon the death of the widow. See Jeffreys v. Reynous, 6 Bro. P. C. 368. See also Gordon v. Adolphus, *ib.* 306.

of uses, and consequently not to be destroyed with the destruction of the freehold; though, if limited after a vested estate tail, destructible by the recovery of the tenant in tail, which bars as well all executory and conditional limitations, as all subsequent estates in remainder.

We may conclude this head by stating the following particulars: — A contingent remainder for years requires no preceding freehold to support it. It is only necessary in the case of a freehold contingent remainder; in which case it is to be noted that the estate supporting, and the estate supported, must both be created by the same conveyance or instrument. (*d*)

The legal estate vested in the general trustees will support a contingent remainder; (*e*) and here we may add, that the trustees always take the fee where the purposes of the trust require it. (*f*) Nor is it necessary that the precedent freehold should continue in the actual seisin of the tenant. A right of entry, such as remains after disseisin, if it subsists at the time the remainder should vest, will support it: but a right of action will not avail to the same purpose. (*g*)

SECT. II.

Executory Devises.

FROM what has been already in this Chapter succinctly laid down, it has appeared that the creation of future interests in real property could occur in very few cases at common law. Before the statute *De Donis*, the limitation to a man and the heirs of his body, which vested in him a conditional fee, left in the grantor no portion of the estate, but only a mere possibility of reverting to him on failure of heirs of the body of the donee. By the operation of the statute *De Donis*, the

(*d*) See Fearn. Cont. Rem. 228.
(*e*) *Ibid.* 230.
(*f*) 1 Ves. 491.
(*g*) Fearn. 212.

estate so granted, from being a fee simple with a condition annexed to it, was reduced to a partial or particular estate, after which, as after an estate for life, an ulterior appropriation might be made of the property, being a step beyond what was allowed after a grant at common law of any kind of fee, either absolute or conditional; and such subsequent estate being carved out of the portion of the fee which was left in the grantor, was called a remainder: but as the freehold was never allowed to be in suspence, such remainder necessarily failed of its effect, unless it vested either during the continuance of the preceding estate, or at the very instant of its determination.

Of the nature of the strict condition at common law.

Besides the determinable and conditional fee, there was another shape, and only one other, in which a future interest in real property might exist at common law,—the right of entry upon the land for a breach of a condition. Originally the only condition to which land could be subjected was the performance of the services which the law of tenures under the feudal system annexed to every grant. Other conditions in process of time were coupled with alienations of real property on the nonperformance of which the grantor asserted his right of resuming the land, a practice which by degrees became recognized as law. But the right of entry for the nonperformance of any of these conditions was always strictly confined to the donor and his heirs; whose entry annulled the livery by which the grant was made, and by consequence all the estates which depended upon that livery, and restored the former seisin as if no grant had been made.

Conditional limitations.

It appears, therefore, that such interests as are now capable of being created under the forms of conditional limitations could have had no legal existence before the statute of Uses. But while uses were only of a fiduciary character, though not available in courts of law, they were to a certain extent enforced in equity as of moral obligation, and binding upon the conscience of parties. And where wills were allowed under the

customs of particular places, it is probable that such favourable regard was always had for the dispositions of property made under such solemn circumstances, as would tend to relax the rigour of the law in order to give them effect. When the statute of Uses was enacted, these executory uses fell under the cognizance of the courts of law, and it became a matter of most important consideration to settle their legal character and extent. The result was, that the common law tribunals determined them to be of a description which the statute should be considered as executing; and thus adopted them into the frame of English jurisprudence, under the several denominations of conditional limitations, future, springing, or shifting uses, and executory devises, according to the manner of their creation, or the nature of the events on which they were limited.

The *nature* of these limitations by way of remainder, and those which operate through the medium of uses and executory devises, distinguished.

These modifications of property thus introduced into our law by the construction and application of the statute of Uses, and the commensurate extension of the executory devise, hold an affinity with remainders in one respect, and with the entry for breach of condition in another;—they resemble a remainder in carrying the estate over to a stranger upon the happening of the events on which they are limited to take place; and they may be compared to the entry for breach of condition in their operation to defeat the preceding estate. These executory limitations, however, stand more allied to contingent remainders, to which in a manner they may be considered as supplementary, and as calculated to effectuate dispositions which would be void as contingent remainders by the rules applicable to that form of limitation. An executory devise is, in the language of Mr. Fearne, such a limitation of a future interest in lands or chattels, as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void. And the rule accordingly is that wherever a future interest is so limited by

A limitation framed to have its effect as a

remainder is not to be construed an executory devise.

devise, as to fall within the rules above laid down for the limitation of contingent remainders, it must have its effect as a contingent remainder, and not as an executory devise. Thus in the important case of Purefoy *v.* Rogers, (*d*) where a man devised to his wife for her life, and to her son after the death of his mother, if she should have a son, and if he should die within age, then to the right heirs of the devisor, and the testator died without issue, and his wife married again, and then the heir of the devisor by fine conveyed the reversion to the husband and wife who had afterwards a son born, it was adjudged that the estate limited to that son should not enure by way of executory devise, because that was never allowed where a contingent estate was limited to depend upon a freehold capable of supporting it; and here the mother had a preceding freehold in herself; it was therefore a contingent remainder in her son; and the heir at law having a reversion in fee in him by descent, it was held that the remainder was destroyed by his conveying the reversion to the particular estate of the mother, and so destroying it by the merger before the son was born.

The case of Wealthy *v.* Bosville (*e*) is another decisive instance of this rule; where a testator devised, that in case his son T. should happen to die before he married, or being married should have no children lawfully begotten, then his lands should remain and descend equally to his daughters and their heirs, except such jointures as his son should happen to make on his wife, not exceeding, &c. And in case both his daughters should die without being married, or being married should have no children of their respective marriages, then he willed that all his estate should descend to his nephew J. M.; and at the end of his will he gave and devised to his son T. all his estate real and personal, not already disposed of by his will. After the testator's death, his son T. entered, and suffered a recovery to

(*d*) 2 Saund. 380. (*e*) Ca. temp. Hardw. 258.

the use of himself and his heirs, and died without issue After which his sisters entered and suffered a recovery, and then died without issue, upon which the heir of J. M. entered; and the question was whether the devise to J. M. was a remainder or an executory devise? Lord Hardwicke observed, that there were two rules which went a great way towards determining the case.—First, that it was immaterial in a will which words came first, and which last: for that the construction must be made upon the whole will. Secondly, that no limitation should be construed to be an executory devise, if it might be a remainder. That in the latter part of the will there was an express devise of all the residue, so that to take the two clauses together there seemed to be an express devise to the son, which being given by the word 'estate,' was sufficient to carry the fee; so that it amounted to a devise to his son and his heirs, and if he died without issue remainder over, which was nothing but an estate tail. But if that were not so; yet, as to the daughters, he thought no objection could be raised, for that there was a devise to them; and if they died without children, &c. so that their recoveries at least were sufficient to bar the nephew's remainder; and judgment was given accordingly.

The same doctrine was further confirmed in Goodtitle *v.* Billington, (*f*) by Lord Mansfield, and in Doe *v.* Morgan, (*g*) by Lord Kenyon; in which latter case a testator devised to his wife for her life, remainder to E. his son for ninety-nine years if he should so long live, and after the deceases of his wife, and E. his son, to the heirs of the body of the said E.: but not to descend entirely unto E.'s eldest son; but that E. might appoint the same to all his children living at his death; and in default of appointment, then to his sons as tenants in common in tail, remainder to his daughters, remainder over. The mother died in the lifetime of E. the son; and it was held that the limitation to the issue of E. being a contingent remainder failed by the death

(*f*) Dougl. Rep. 725. (*g*) Durnf. and East 763.

of the mother (who had the only preceding estate of freehold) in E.'s lifetime, for want of a continuing estate of freehold to support it. It was contended here that the devise to the issue of E. was good by way of executory devise, which construction could alone support the testator's intention: but Lord Kenyon observed that if there existed a rule respecting executory devises which had uniformly prevailed, it was that which was laid down by Lord Hale, in Purefoy *v.* Rogers, that where a contingency is limited to depend upon an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only.

If the freehold upon which the contingent remainder is limited fails in the lifetime of the devisor, it may operate as an executory devise.

If, however, the freehold upon which the contingent remainder is limited fails in the lifetime of the devisor, so that the limitation can never come into existence as a remainder, it shall upon the death of the devisor enure as an executory devise, rather than fail from such accident. When a preceding freehold has once vested, no subsequent accident will make a contingent remainder enure as an executory devise: but by the death of the first devisee in the testator's lifetime, the subsequent limitation is in the same condition at the testator's death, if the contingency has not then happened, as if it had been originally devised without any preceding freehold to support it. Thus in Hopkins *v.* Hopkins, (*h*) where A. devised land to trustees, and their heirs, in trust for B. for life, and after his decease for the first and other sons of B. successively, in tail male, remainder to the future sons of C. for life successively, and after divers intermediate devises, remainder to D., and B. died without issue in the lifetime of the testator, and afterwards the testator died before any of the contingent remainders were vested, the question was, whether the mean contingent remainders were not become void, there being no preceding estate to support them: but it was adjudged that the intermediate limita-

(*h*) Ca. temp. Talb. 44.

tions should enure as executory devises. And a son being afterwards born to C., it was held that the executory devise, having thereby become a vested estate in him, the subsequent limitations were all thereupon turned into contingent remainders dependent upon his estate. (*i*) The son of C. afterwards died before the subsequent limitations vested; and yet it was held that they were not destroyed, because the inheritance which was vested in the trustees was sufficient to support them.

And it is further to be observed, that where a particular estate of freehold is first devised, sufficient of itself to sustain a contingent remainder; yet if the limitation over is so limited as not to be capable of commencing during its continuance, or immediately upon its expiration, such limitation over, if not too remote for the limits allowed to such suspended interest, may have its effect as an executory devise. As if a lease were made for life to A., with a direction that upon A.'s death, and one day after, the land shall remain to B. for life, the limitation to B. would be void as a remainder, as being incapable of taking place immediately upon the determination of the particular estate: but as an executory devise, it would doubtless be good. (*j*)

The strict condition and conditional limitation distinguished.

The contingent remainder takes precedence in point of construction of the executory devise: but as between the strict condition and what is called the conditional limitation, the latter, though of latest adoption, is preferred in construction; and this, for the sake of giving effect to the intentions of the disposer. For where an estate is given upon a condition, with remainders limited over, if such condition were construed as a strict condition at law, none but the donor, or the person from whom the condition moved, or his heirs, could enter for the breach of it; and thus that which was designed to give the remainder effect would be its destruction.

The necessity for this construction to effectuate the

(*i*) Reeve *v.* Long, 2 Saund. 380. Brownsword *v.* Edwards, 2 Vez. 243.

(*j*) See Plowd. 25. Raym. 144.

ulterior estates, where the conveyance was at common law, has been considered as created by the operation of the entry for a condition broken to defeat the livery, and by consequence the estates dependent upon it. And upon this ground it has been said, that a difference was made between cases of common law conveyances and devises: for as there was no livery in the case of a devise, the entry might affect only the particular estate to which the condition was annexed, leaving the remainders to have their effect when limited to commence; and that therefore it was not necessary to construe the condition into a conditional limitation for the sake of the ulterior intentions of the donor. But whatever differences of this sort may formerly have been admitted, they appear to have long been at an end; and as the doctrine is now settled on the subject, wherever an estate is devised with a condition annexed upon the breach or non-performance of which it is devised over, such condition shall take effect as a conditional limitation, in virtue of which the first estate shall determine of itself and give place to the succeeding interests which shall immediately commence in enjoyment or right; and thus the intention is effectuated as well as to the forfeiture annexed to the breach of condition, as the ulterior dispositions of the property.

A testator had two sons, R. the elder and H. the younger, and also two daughters, and devised certain lands to H. in tail, when he should come to twenty-four years of age, upon condition that he should pay to his two daughters twenty pounds a-year at their full age; and if the said H. should die before twenty-four, then he directed that R. his son and heir should have the same lands to him and to his heirs, he giving and paying unto his said daughters the said money, in such manner as H. should have done if he had lived; and if his sons H. and R. (if the said lands should come to the said R. by the death of H.) did not pay the said money to his daughters, then that the lands should remain to his daughters and their heirs for ever, and this was held to

be a conditional limitation and not a condition; so that upon H.'s not paying the money to the two daughters after his age of twenty-four years, and at their full age, R. should have the land by way of limitation, and not as the heir claiming under a title by entry for breach of the condition; for his entry, as for the condition broken, would defeat the portions given to the daughters, and the future devise to them; and thus contravene the express intentions of the testator. (*k*) So that even where the breach of the condition cast the estate upon the heir, he was held to take it as a stranger in virtue of the limitations, rather than by his strict title under his common law character, for the sake of giving to the will its full accomplishment.

So where by construing the restrictive words as importing a mere common law condition the condition would itself be inoperative and nugatory, it will have its effect as a limitation. As where a man devised lands to A. his heir at law, and other lands to B. in fee, and directed that if A. molested B. by suit or otherwise, he should lose what was devised to him, and it should go over to B., and after the testator's death A. entered on the lands devised to B., and claimed them; it was *held* that this breach of the condition gave title to B. in virtue of the limitation; for if it were construed as a strict condition, he who broke it could alone enter for the breach of it, and so the whole efficacy and intent of it would be annulled. (*l*)

But as words clearly importing a condition, are construed as words of limitation only for the sake of effectuating the manifest intentions of the testator or donor, where the intention does not require such construction, a condition will not be read as im-

(*k*) Wiseman *v.* Baldwin, 1 Roll. Abr. 411. See also Lady Fry's case, 1 Vent. 202, 321, 322. Page *v.* Hayward, 11 Mod. 61. 2 Salk. 570. Scholastica's case, Plowden, 408.

(*l*) Shuttleworth *v.* Barber, 2 Mod. 7.; and see Wellock *v* Hammond, Cro. El. 204. 3 Rep. 20. b. Fulmerston *v.* Steward, Cro. Jac. 592. Dy. 33. a. Avelyn *v.* Ward, 2 Ves. 420.

plying a conditional limitation; as where there is no express limitation over, to take effect upon the breach or performance of the condition annexed to the prior estate. And this is exemplified in the case of Gulliver *v.* Shuckburgh Ashby. (*m*) There a testator devised to W. for life, remainder to S., and the heirs male of his body lawfully begotten, with successive remainders in tail over, with a condition that whenever it should happen that the estate should descend or come to any of the persons thereinbefore named, that he or they should change their surname and take upon them and their heirs the surname of W. only. S. the first tenant in tail entered upon the death of W., held the estate for about three years, then suffered a recovery and aliened it, but never took upon him the surname of W. The person next in remainder entered for breach of the proviso; and in support of his title it was contended that the proviso was a conditional limitation, and not a mere condition; that the taking the surname ought to have been complied with immediately by S. on his coming to the estate; and that consequently the title of the remainder-man took effect before the recovery was suffered, and was therefore not affected by it: but the Court would not construe this a conditional limitation; for it was not expressly so, the estate not being made to cease and go over upon it. And by so considering it, the testator's intention would not be promoted but defeated, as it could not be his wish that the issue in tail should be stripped of the estate. As a condition subsequent it was nugatory, as the tenant in tail might immediately bar the estate, and all posterior conditions and limitations by a common recovery; and, therefore, Yates, J. thought it could only operate as a devise or recommendation.

Of the different sorts of future and executory interests.

Where any of the future estates above considered cannot take effect as remainders according to the definition of a remainder, before noticed, if the limitation

(*m*) 4 Burr. 1929. Blackst. 607.

be by deed, it may take effect as a springing use; and if by will, as an executory devise, provided it falls within the bounds which the law has assigned to these dispositions of property. And a limitation will stand in need of this indulgence, if it be of an estate to take effect after a preceding vested estate in fee, and in defeasance of it; or if it be of a contingent interest unsupported by any preceding freehold, or if it be of the freehold to commence *in futuro,* without any prior estate.

To give a few examples in each kind;—Where a testator devised to one and his heirs, upon condition that he should assure certain lands to his executors, and if he failed, then to the executors and their heirs; this was a good executory devise; (*n*) or, as in the leading case of Pell *v.* Brown, (*o*) where a man devised lands to his son T., and his heirs *in perpetuum,* and if T. should die without issue, living W. his brother, then W. should have the same lands to him and his heirs, the limitation to W. was adjudged a good executory devise to take effect on the contingency of T.'s dying without issue in the lifetime of W. The limitation to W. could not be a remainder, for one fee could not be in remainder after another. W. had no estate depending upon the estate of T.; but a mere collateral possibility, which was not affected by a recovery suffered by T. in his lifetime.

Of the operation of an unsupported contingent limitation as an executory devise, the case of Gore *v.* Gore(*p*) may be taken as an example; there a testator devised to trustees for five hundred years, in trust to pay an annuity to his eldest son for life, remainder to the eldest son of that eldest son, who had no son at the testator's death, and such limitation, there being no freehold to support it, was held good by way of executory devise. So

(*n*) Fulmerston *v.* Steward, Cro. Jac. 592.
(*o*) Cro. Jac. 590.
(*p*) 2 P. Wms. 28.

where a man devised to his wife till his son attained the age of twenty-one, and then that his son should have the lands to him and his heirs, but if he died without issue before his said age, then to his daughter, and her heirs, this was adjudged to be a good executory devise to the daughter, if the contingency happened. If he lived to twenty-one, though he died afterwards without issue, or if he left issue, though he died before twenty-one, the daughter could not have the lands. (*q*)

Of the devise of a future interest, not limited upon any contingency, but not preceded by any estate, the case of Clark *v.* Smith (*r*) may serve as an instance. There A. devised lands to B. to commence and take effect six months after the testator's decease, and it was held a good executory devise. So if there be a devise to the heir of J. S. after the death of J. S., it is good as an executory devise. (*s*)

And it is to be well observed in all these cases, that during the postponement of the limitation, or suspence of the contingency, the freehold was not in abeyance, but descended in the mean time to the testator's heir at law, which is the invariable rule wherever there is an executory devise of the real estate. And from thence arises the necessity in case an estate in tail is limited to arise at a future period, as at a time certain after the testator's death, that the heir at law should be made tenant to the *præcipe* in a recovery to be suffered of such future interest.

But it is very necessary to discriminate between the operation of the rule last adverted to, and the principle of the case of Boraston in Coke's Reports, (*t*) which is, that where an inheritance in lands is given, and a particular interest in the mean time is limited, until the

(*q*) Hinde *v.* Lyon, 3 Roll. Rep. 197, 217. Boulton's case, Palm. 132. 1 Eq. C. Abr. 188. 3 Leon. 64, 70.

(*r*) 1 Lutw. 798. cited 2 P. Wms. 43., and see Pay's case, Cro. El. 878.

(*s*) 1 Salk. 229. *per Cur.*

(*t*) 3 Rep. 19.

devisee comes of age, the particular interest operates only as an exception out of the devise, which takes effect presently as a vested interest, subject to such particular interest, the devise of which is not to be considered as making a condition precedent, so as to render the subsequent devise contingent and depending upon the event of such devisee's coming of age, in which view it would be an executory devise: but the wording of such limitation must be regarded only as an appointment of the time when the devisee of the estate is to have the possession; which estate vests in him immediately, subject to the particular interest by which his possession is suspended.

In Boraston's case above referred to, land was devised to A. and B. for eight years, and after the said term to remain to the testator's executors till such time as H. should accomplish his age of twenty-one years; and when the said H. should come to his full age of twenty-one years, then the testator willed that H. should enjoy the lands to him and his heirs for ever. H. died under twenty-one; and it was contended that the remainder did not vest in H. because he did not live to attain the age of twenty-one years; for as he was not to have it until his age of twenty-one, it was contingent on that event, it being uncertain whether he would ever attain that age. But it was held that it was in effect a devise to the executors till H. attained the age of twenty-one years, remainder to H. in fee, and that the adverbs of time *when* and *then* did not make any thing necessary to precede the settling of the remainder, any more than in the common case of a lease for life or years, and after the decease of the life, or end of the term, remainder to another, in which case the remainder vests presently. The adverbs expressed the time when the remainder to H. should take effect in possession, and not when it should become vested. (*u*)

(*u*) See Goodtitle *v.* Whitby, 1 Burr. 228., and Mansfield *v.* Dugard, 1 Eq. Abr. 195. Trodd *v.* Downs, 2 Atk. 304. Tomkins *v.* Tomkins, cited 1 Burr. 234.

Where the devisee is not a person in being, or where no present interest is devised in the mean time, or where there are words importing a condition to suspend the vesting, as if the words had been, in the case just mentioned, if H. should attain the age of twenty-one, or have issue, then to him and his heirs, the estate would not have vested until the event on which it was limited to depend should happen. (*x*)

Of future limitations of terms of years after life estates therein.

We have shewn in another place, that if a term of years, or any personal estate, were devised to one for life, and after the decease of the devisee for life were limited over to another, such ulterior limitation was formerly treated as void at common law, and the person to whom the term was given for life took, in virtue of such disposition, the whole estate in the same. The courts, however, have always been studious of making such construction in favour of the limitation over as might give it effect; and to this end a distinction was taken between the use and the thing itself. As when the terms of the devise were that the first taker should have the use of the thing, for his life, and afterwards another should have it, such ulterior disposition was supported. This distinction has, however, long ceased to be of importance. The next step in the progress to the present doctrine was the resolution, or rather the principle of the resolution, in the case of Matthew Manning, (*y*) where the lease of a farm was devised to B. after the death of A.; and in the mean time that his wife should have the use and occupation of the farm; there, though it was contended that the devise in favour of the wife gave her the whole term, and that consequently the devise over was void, it was held by three judges against one, that it took effect in B., not as a remainder, but as an executory devise. And it was considered that the executory devise to B. took effect first, and the dis-

(*x*) Bullock *v.* Stones, 2 Ves. 521. Brownsword *v.* Edwards, 2 Ves. 243.

(*y*) 8 Rep. 95.

position in favour of the wife was to be considered as a subsequent devise of what had not been given away.

It is evident that the principle of the above decision did not require that the devise of the life interest in the lease should have been considered as giving it for the use and occupation of the wife, as it was there expressed: it extended equally to the support of every case of a devise to one for life, with a limitation over to another. Thus in Lampet's case, (z) which came soon after the case of Matthew Manning, a term of 500 years was devised to A. for his life, and after his decease, remainder to B. and the heirs of her body; and though the term itself, and not the use, was devised to the first taker for his life, the limitation over was adjudged a good executory devise.

And where a testator devised his term for eighteen years, and afterwards to his eldest son for his life, remainder to the eldest issue male of that son for life, though the son had no issue male at the time of the devise or death of the testator, it was held that if he had had issue male at his death, such issue male should have had it as an executory devise. (a)

With respect also to chattels personal, the courts of equity have followed up the same doctrine. Accordingly where a sum of money or goods have been bequeathed to one for life, and upon his decease to another, the executor has been held chargeable in trust for the ulterior legatee: and as early as in a case in 1695, it was treated as settled doctrine, that upon a devise of goods to A. for life, with remainder after his decease to B., such remainder was good as an executory trust for B., who might compel A. by his bill in equity to give security that the goods should be forthcoming at his decease. (b) And Lord Keeper Somers in the case of

(z) 10 Rep. 46.

(a) Cotton v. Heath, 1 Roll. Abr. 612. 1 Eq. C. Abr. 191. And see 1 And. 60, 61.

(b) 2 Freem. 206.

Hyde *v.* Parratt, (*c*) where a man devised his household goods to his wife for her life, and after her death to A., and made B. his executor, upon a bill filed by A. against the widow and executor, to have an inventory of the goods, and that the widow should give security for their being produced at his death, held the devise over to be good.

With respect to these remainders in moveable chattels, we shall speak in another place; it will be sufficient for the present to observe that it is wholly a branch of equitable jurisdiction to give effect to the successive interests in this flux description of property; the Court of Chancery alone, through the medium of trusts, and its peculiar province of enforcing executory obligations specifically, having the means of providing for the custody, preservation, and transmission thereof.

All devises over after an executory devise must operate as executory devises.

It is a rule respecting the executory devise, that all the estates limited after such a limitation must also be considered as executory devises; for the several limitations of a devise of one and the same thing are not allowed to operate several ways, that is, some by way of executory devise, and others by way of remainder. But the student should be made aware that although no proper remainder can be limited after an executory devise, an executory devise may well succeed to a contingent remainder. Thus, if after a contingent devise in fee simple, with a freehold to support it as a remainder, a devise be so limited as to take effect in defeasance of the estate immediately preceding it, on an event subsequent to its becoming vested, it may be a good executory devise, as appears by the case of Gulliver *v.* Wickett, (*d*) where a testator devised to his wife for her life, and after her death to such child as she was then supposed to be ensient with, and to the heirs of such child for ever, provided that if such child as should

(*c*) 1 P. Wms. 1. And see 3 P. Wms. 336. 2 Atk. 82, 321. 1 Bro. C. C. 279.

(*d*) 1 Wils. 105.

happen to be born should die before the age of twenty-one, leaving no issue of its body, the estate should go over, the Court construed the limitations to be a devise to the wife for life, with a contingent remainder to the child in fee, and an executory devise over; and considered further, that if the first contingency never happened by the birth of a child, the ulterior limitation was to take effect upon the decease of the wife. Nor does it signify how many contingencies are limited one after another, provided they are all so limited as to happen, if they happen at all, within a life in being, and a reasonable time afterwards. In the case last mentioned the limitation over took place place in fact immediately upon the determination of the particular estate; and if it had been limited singly upon the event of the child's never coming into existence would have been a good contingent remainder, with a precedent particular estate to support it, being an alternative limitation simultaneous in point of time with the contingent devise to the child itself: yet the other event, and that on which the limitation was expressly made to depend, *viz.* the death of the child, if born, under the age of twenty-one, could not happen till after the estate in fee had become vested in such child upon its birth; in which case it could not operate as a remainder, and could only therefore be considered as an executory devise.

The executory devise of a freehold can be created only by limiting an estate to take effect by the defeasance of a precedent estate in fee; or to commence *in futuro,* either upon a certain or contingent event without a precedent estate. In the first of these predicaments it is of course, that if the first estate by being limited in a will after a fee must be on that account an executory devise, every subsequent limitation must on the same account, being equally limited after a fee, be an executory devise. And in the second supposition, if the first limitation is an executory de-

vise, by reason of its having no freehold to support it, every subsequent contingent limitation must be for the same reason an executory devise. If the first limitation be not contingent but vested, then the predication fails as to the first future limitation, which cannot be an executory devise, there being a vested antecedent freehold to support it.

A remainder may be vested after a contingent remainder.

But contingent remainders may intervene between the particular estate and a vested remainder; and a remote contingent remainder may become vested in interest before a preceding one. In the first case, however, the contingent remainder must not be of the fee, and the ulterior remainder must be to a person *in esse*. As in the ordinary case of settlement where there is a conveyance to the use of A. for life, and after his death to the use of his first and other sons successively in tail, with remainders over to persons in existence at the time; if A. has no sons at the time of the settlement, the uses to his sons will be contingent, but the ulterior uses to persons *in esse* will be vested; and the contingent use or uses, in case of the birth of a son or sons, will become, upon every such event, interposed and vested. If the limitation after the sons were to the heir or heirs special of the first tenant for life, such posterior limitation would be considered as executed in the interim in the first taker *sub modo*, subject to open again and let in the intervening limitations, on the happening of the contingency, on which they were severally limited, which, in the case supposed, would be their coming into existence. (*e*)

Whether the intervening limitations be contingent by being, as in the above supposed case, limited to persons not in existence at the time, or by being made expectant on any other contingency, the limitations over to persons *in esse*, if the contingency of the interposed limitations does not extend to them, may be vested

(*e*) Lewis Bowles's case, 11 Rep. 80.

remainders, notwithstanding such antecedent contingent remainders. As where a feoffment was made by A., to the use of himself for life, remainder to the use of trustees for eighty years, if B. and C. his wife should so long live; and if C. survived B. her husband, then to the use of C. for life; and after her decease to the use of D. in tail, remainder over; though it was agreed that C.'s estate for life was contingent, on the event of her surviving her husband, yet it was held that the subsequent remainders were vested. (*f*)

A subsequent contingent remainder may become vested in interest before a prior contingent remainder.

And a posterior contingent remainder may become vested in interest before a preceding one. As where A. was tenant for life, remainder to his first and other sons in tail male successively, remainder to B. for life, remainder in like manner to his first and other sons; B. had a son, and A. no son; A. cut timber trees: and it was adjudged that the son of B., who was then tenant in tail, should have them, for the property thereof was in him by reason of his inheritance. (*g*)

But after a contingent limitation of the fee, no subsequent limitation can be vested.

But when there is a contingent limitation in fee, no subsequent limitation can be vested, as was decided in Loddington *v.* Kime, (*h*) where there was a devise to A. for life, of S. W.; and if he had issue male, then to such issue male and his heirs for ever; and if he died without issue male, then to B. and his heirs for ever; and the Court held that the remainder to B. and his heirs was not vested, because the precedent limitation to the issue of A. was adjudged a contingent fee. When indeed such contingent limitation was not of an absolute but a determinable fee, or where land has been devised in trust for some special purposes, it seems to have been otherwise adjudged. (*i*)

In all these cases of remainders vested or becoming vested, before a preceding contingent remainder, it is to

(*f*) Napper *v.* Sanders, Hutt. 119.
(*g*) Uvedale *v.* Uvedale, 2 Roll. Abr. 111.
(*h*) Lord Raym. 208. 1 Salk. 224.
(*i*) Ambl. 204.

be observed that there has been a preceding freehold estate vested in possession in the mean time. No subsequent remainder can take effect in possession, and again give place to a preceding contingent estate upon the contingency happening; for the vesting in possession of a subsequent estate destroys the contingent remainder. But in the case of a limitation posterior to an executory devise, no such antecedent estate of freehold is by the supposition vested in possession. They are all equally freeholds to commence *in futuro,* and limited to arise in a certain sequence and order that cannot be transposed.

When the first executory devise vests, a change in the nature of the subsequent limitations may take place, which may thereby either become vested or contingent remainders. And it is worthy of being remembered that while a preceding executory limitation is uncertain and contingent, a subsequent limitation, though executory and future, may yet be certain and unconditional; and may be so limited as to take immediate effect in possession upon the failure of the prior executory limitation, or to assume the quality of a vested remainder, if such prior limitation, supposing the same to be less than the fee, takes effect. This appears from the case of Brownsword *v.* Edwards, (*k*) where there was a devise to two trustees and their heirs to receive the rents until B. should attain twenty-one; and if B. should attain twenty-one or have issue, then to B. and the heirs of his body: but if B. should happen to die before twenty-one, and without issue, remainder over. B. attained the age of twenty-one, and afterwards died without issue, Lord Hardwicke, considering the word *and* as used for *or,* and the condition as disjunctive instead of copulative, decreed that the remainder should take effect. So likewwise a subsequent limitation may become a contingent remainder, if limited upon a contingency which remains after the prior executory devise has taken

When the first executory limitation has become vested, the subsequent executory devises may become remainders.

(*k*) 2 Ves. 243.

place. Thus in Hopkins *v.* Hopkins, (*l*) already cited, where A. devised lands to trustees in trust for B. for his life, and after his decease for the first and other sons of B. successively in tail male; remainder to the future sons of C. for life successively, with intermediate devises, remainder over to D.; and B. died without issue in the lifetime of the testator, and afterwards the testator died before any of the contingent remainders vested, the mean remainders to the sons of C. were construed as executory devises, as the only construction that could render them effectual. And upon the birth of a son to C., it was held that the executory devise having become vested, the subsequent limitations became contingent remainders.

A devise to an infant in the womb by words of present import, good.

It seems to have been once a prevailing opinion that if a testator, by words of present import, made a disposition, which could not have any effect but at a future period, such devise was void; as where the devisee was not in actual existence, and the terms used by the testator did not expressly indicate the future operation of the devise. As if one devised to the heir of I. S., and I. S. was living at the death of the testator. And upon similar grounds, it was doubted whether a devise to an infant in the womb of its mother, or, in technical words *en ventre sa mere,* was good. But this controversy, having very little sense to justify it, has long ceased to exist; and no doubt is now entertained that such limitations, in whatever words expressed, clearly indicating a knowledge in the testator that the effect of his disposition may be deferred to a future period, will have their operation as executory devises. Thus the validity of a devise to unborn children, or to the heirs of one who has no children, is now out of all doubt or debate. (*m*)

(*l*) Ca. temp. Talb. 44. See also Stephens *v.* Stephens, *ib.* 228. and Brownsword *v.* Edwards, 2 Vez. 243.

(*m*) Gulliver *v.* Wickett, 1 Wils. 106. Chapman *v.* Blissett, Ca. temp. Talb. 150. Doe *v.* Carleton, 1 Wils. 225. Harris *v.* Barnes, 4 Burr. 2157.

It has been already shewn that where land is limited by will so as to operate by way of executory devise, and no disposition is made of the freehold, the inheritance descends in the interim to the heir at law, until the devise can take effect in interest: which doctrine is well exemplified in the case of Hayward *v.* Stillingfleet.(*n*) And the intermediate profits will of course accompany the title. Thus in Hopkins *v.* Hopkins, where the testator in express terms provided for the disposition of the rents and profits during the minorities of the future sons of C. when they should come into existence, it was decreed that the rents and profits should go to the heirs of the testator from the time of his death till the birth of a son of C.; and afterwards, a son being born, that upon the death of that son they should again belong to the heir, until some one of the subsequent limitations should vest in interest.

During the suspense of the contingency the inheritance descends.

Where there is a devise, however, of all the rest and residue of the real estate, the profits of the land, from the testator's death until the time of the vesting of the executory estate, or from the determination of the first vested estate till the vesting of the subsequent estate, will pass thereby to such ultimate devisee. (*o*) And so likewise, in the case of an executory devise of personal estate, such intermediate profits, during the suspense of the limitation, will pass by the general residuary bequest. (*p*) But if there is no residuary or other particular disposition made of these intermediate profits of the personal estate between the death of the testator, or the determination of a vested interest, and the vesting of an executory bequest, they are to be accumulated for the person entitled in virtue of the next executory limitation. Thus where a testator devised a chat-

How the rents and profits go during such suspense.

(*n*) 1 Atk. 422.

(*o*) Stephens *v.* Stephens, Ca. temp. Talb. 288 Duke of Bridgwater *v.* Egerton, 2 Ves. 122.

(*p*) Chapman *v.* Blisset, Ca. temp. Talb. 145.

tel estate to A. an infant, and if A. should die before twenty-one, and his mother should have no other child, then to B., and A. died an infant; it was decreed that the rents and profits from the death of A. till the contingency should happen should accumulate and be added to the capital; and if A.'s mother should have no other child, they should go to B. (*q*)

These last mentioned cases, however, must all be distinguished from Boraston's case, (*r*) and others of that kind, which have been already placed before the Reader, in which the previous particular interest was only considered as an exception out of the devise of the inheritance, which was made subject to it, and which vested so subject in the devisee immediately. And Boraston and other similar cases are again to be distinguished from others where the devisee is not in existence at the death of the testator, or where no present interest is devised in the mean time. (*s*)

Executory devise not barred by any act done to destroy or affect the preceding estate.

The most important characteristic of the executory devise is its incapability of being barred or destroyed by any act done to alter, affect, or annul the estate, after which it is limited, or out of which it is created. Upon which point, the great ruling case is that of Pells *v.* Brown, (*t*) where a man devised lands to his son T. and his heirs *in perpetuum*, paying to R. 20*l.* at his age of twenty-one years; and if T. should die without issue, leaving W. his brother, then W. should have the lands to him and his heirs. T. entered and suffered a recovery; and it was adjudged that T. took a fee, it being devised to him and his heirs *in perpetuum*. And the limitation over, not being upon his dying without issue ge-

(*q*) Studholme *v.* Hodgson, 3 P. Wms. 300. and see Bullock *v.* Stones, 2 Ves. 521.

(*r*) 3 Rep. 19. 1 P. W. 170.; and see Taylor *v.* Biddal, Freem. 243.

(*s*) Bullock *v.* Stones, 2 Ves. 521. Brownsword *v.* Edwards, 2 Ves. 243.

(*t*) Cro. Jac. 590.

nerally: but upon the contingency of his dying without issue, living W., was a good executory devise to W.: for it could not be a remainder, because one fee cannot be in remainder after another fee. It was accordingly held that the recovery suffered by T. did not bar the executory limitation to W.; because W. had no estate depending upon the estate of T., but a collateral independent expectancy or possibility which could not be reached by the recovery.

The principle of the above decision turned upon the circumstance of the first estate being a fee-simple, which would not permit the subsequent limitation to be construed a remainder. Had it been an estate in tail only, the limitation over on the event of T.'s dying in the lifetime of W. without issue would have been a contingent remainder, for it would have been expectant upon the expiration of a particular estate within an assigned period, and not so limited as to take effect by defeating or abridging such particular estate. (*u*)

Remainder of a term after a life interest must operate by way of executory devise.

With respect to a term of years there can be no proper remainder thereof after a life interest previously granted on the same: but any such limitation over must operate by way of executory devise. And it will follow from what has been just observed as to the unbarrable nature of this description of executory limitation, that such ulterior interest in a term will not depend upon the continuance of the prior estate; so that if a term of years is devised to one for life, and the residue to another, if the first estate is forfeited by the act of the devisee for life, or merged by the accession of the inheritance, the executory interest will remain undisturbed. (*x*) And if lands be devised for twenty-one years to A., and if he die

(*u*) See Spalding *v.* Spalding, Cro. Car. 185.

(*x*) Hammington *v.* Rudyard, cited in Lampet's case, 10 Rep. 52. Cotton *v.* Heath, Pollexfen 26. Lee *v.* Lee, Moor. 268.

within that period, that B. shall have the residue of the term, no act of A. can prejudice B.'s remainder. (x)

But if an executory devise or limitation comes after an estate tail, it will be barred by a recovery suffered by the tenant in tail. Thus, if an estate is devised to A. and the heirs of her body, by a person named, provided that if she marry any but that person, it shall remain to B. and his heirs. A common recovery suffered by A. before marriage will bar her estate tail, and put an end to the conditional limitation over, so that after such recovery she may marry any other person than the person so named. (y) So if an estate tail is devised determinable on the nonpayment of a sum of money, by a recovery suffered before the time appointed for payment, the condition or obligation is barred and extinguished. (z)

Extent to which the law allows the vesting to be suspended.

The quality of exemption from being aliened or barred by any mode of conveyance, whether by recovery, fine, or otherwise, until the contingency happens upon which the limitation is to take place, being considered as giving to executory devises a kind of perpetuity, the law has limited the bounds to which they may be

(x) But though these executory interests are indestructible by the modes above alluded to, they may be operated upon in various ways. We have already seen that they may be devised. It appears also that they may be passed by the release of the persons entitled to them to the first takers. See Lampet's case, 10 Rep. 46 *b.*; and they are no doubt assignable in equity, 2 Freem. 250. 2 P. W. 572. 608. They pass in bankruptcy under the commissioner's assignment, 2 P. Wms. 132. Equity will uphold the assignment of them for the consideration of love and affection, and for the advancement of children, 1 Ves. 409. And where an assignment is made of a contingent interest in lands of inheritance for valuable consideration, equity will carry it into execution as an agreement or contract which ought to be specifically performed. Lastly, it may be observed, that all these contingent or executory interests in real or personal estate may be passed at law by a fine operating by estoppel. See Weale *v.* Lower, Pollex. 54. Moor 554.

(y) Pigot Com. Rec. 176.

(z) *Id.* 136. And see 4 Burr. 1929. Cowp. 379. 2 Bac. Ab. 60.

extended. And if the contingency is too remote, the executory devise dependent upon it is not made void so far as it exceeds the prescribed limit, but void altogether.

At an early period it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years after; (*a*) and the rule was by degrees extended to twenty-one years after the death of a person in being. (*b*) It is now established, that an executory devise is good, if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the period of gestation. (*c*) Which rule was adopted in analogy to strict legal intails, which cannot be protected from fines and recoveries beyond the life of the tenant in possession, and the attainment of twenty-one by the first issue in tail. (*d*)

A man having only one sister and heir, who had issue A., and afterwards married W., by whom she had issue B. and M., devised lands to his sister until B. should attain twenty-one, and after B. should have attained that age to B. and his heirs; and if B. should die before twenty-one, then to the heirs of the body of W. and their heirs, as they should attain their respective ages of twenty-one. The testator died; B. died before twenty-one, living W., and afterwards W. died. It was adjudged that M. either as heir of B., *or as heir of the body of* W., being of age after the death of W., took the estate by way of executory devise. (*e*) There M., who was the heir of the body of W., could not take till the death of W., because *nemo est hæres viventis;* and as that heir of the body of W. who should attain twenty-one might not have been born before his father's death, and the estate could not vest in him till

(*a*) Strange 129.
(*b*) Goodtitle *v.* Wood, Willis's Rep. 213.
(*c*) Long *v.* Blackall, 7 Term Rep. 102.
(*d*) Porter *v.* Bradley, 3 Term Rep. 146.
(*e*) Taylor *v.* Biddall, 2 Mod. 289.

his age of twenty-one, it is evident the estate might possibly not have vested under that limitation till twenty-one years after the period of the life then in being. So where a testator devised lands unto his grandson W. S. and his heirs, but in case W. S. should die before he should attain his age of twenty-one years, then to his grandson T. S., and if T. S. should die before he should attain his age of twenty-one years, then to such other son of the body of his daughter M. S. by his son-in-law T. S., as should happen to attain his age of twenty-one years in fee, and for default of such issue remainder over; and the testator died leaving two grandsons, the said W. S. and T. S., who both died under age; and afterwards another son A. of the body of M. S. by T. S. was born: it was held by the judges of the Court of King's Bench upon a case sent to them, and afterwards decreed by Lord Talbot, that it was a good executory devise to this after-born son A., if he should attain his age of twenty-one years; and the judges decided it upon the authority of the last mentioned case of Taylor *v.* Biddall, the record of which was searched and found to agree in the material parts of it with the printed report. (*f*) In this case the limitation was confined to vest at the infant's age of twenty-one, which must necessarily happen within twenty-one years after the death of its mother M. S. who was then in being. So where (*g*) a devise was to the child with which the testator's wife was then ensient, in case it should be a son, during his life, and after his decease then to such issue male, or the descendants of such issue male, of such child, as, at the time of his death, should be his heir at law; and in case, at the time of the death of such child, there should be no such issue male, nor any descendants of such issue male then living, or in case such child should not be a son, then to P. L.; it was held that it was a good executory devise over to P. L. within the

(*f*) Stephens *v.* Stephens, Cas. temp. Talb. 238.
(*g*) Long *v.* Blackall, 7 T. R. 100.

limits allowed by law with respect to executory devises; for the devise over to P.L. must take effect, if at all, after a life which must be in being within nine months after the devisor's death. This case, it is to be observed, begun with a devise to a posthumous child for life, with a limitation over, upon a failure of issue of his body at his death; which of course would include an heir male then *en ventre sa mere;* for as the devise begun with the allowance for the birth of a posthumous child, and also might conclude with it, the time might be claimed twice over; and so the time allowed for the birth of a posthumous child after lives in being and twenty-one years might be enlarged to two periods of gestation. And therefore in a late case it was objected in argument, either that the effect of beginning an executory devise with the life of a person in the womb had escaped the attention of the Court of King's Bench; or if that Court did take it into their consideration, and meant to say that the executory devise was nevertheless a valid one, that the opinion of the judges in that case was questionable, as having exceeded former determinations, because it added a further period to the boundary of executory devises, and the decision had the effect of taking the life of a person *en ventre sa mere* for a life in being: but that objection was over-ruled, and the case of Long *v.* Blackall was allowed and approved of as a case of undoubted law. (*h*)

Limitation to take effect after a dying without issue generally, too remote.

It has been long established that if an executory devise is limited to take effect after a dying without heirs generally, and without restriction, the limitation is void, as being too remote. So also if the limitation is to A. after an indefinite failure of heirs or issue male, or heirs or issue of the body of B., such devise is equally void for remoteness.

Otherwise where the devise is of the reversion.

In the case of Badger *v.* Lloyd, (*i*) it was agreed that if a man, seised in fee, devise his lands to A. if J. S.,

(*h*) 4 Ves. Jun. 254, 273, 322, 341.
(*i*) 1 Lord Raym. 523.

a stranger, die without issue, that this is an executory devise, because there is no particular estate to support it; and therefore it is void as being too remote: but that if a man, seised of a reversion after an estate tail, devise the lands to another after failure of issue of tenant in tail, it is an immediate devise of the reversion expectant on the estate tail, and therefore good, which is a distinction of great importance to be observed.

The case of Lady Lanesborough *v.* Fox (*j*) was thus: —"A., upon the marriage of his son B., settled lands upon himself for life, remainder to B. for ninety-nine years, if he should so long live, remainder to trustees and their heirs during the life of B., remainder to the first and other sons of B. successively in tail male, remainder to the heirs male of the body of B., reversion to A. in fee, and afterwards having the reversion in fee in himself upon these limitations, devised all the lands contained in the settlement, on failure of issue of the body of B., and for want of heirs male of his own body, to his daughter F., and the heirs of her body; and it was adjudged by the House of Lords, that this will did not give an estate by implication to B., and that therefore the devise to F. was executory and void, as being limited on too remote a contingency." Upon which case Mr. Fearne makes the following remarks:—"We are to observe, says that acute writer, that the limitation to the daughter was future, to arise after the failure of issue of the body of B., and of the heirs male of the body of A. Now there was no subsisting estate extending to the issue of the body of B., (generally,) the settlement being confined to his first and other sons, and their issue male; nor indeed was there any estate tail in A. himself to extend to the heirs male of his own body, therefore the estate devised by A. could not be considered as the devise of a reversion depending or expectant on such preceding estates. And though it should be granted that as A. had but one son, and there

(*j*) Ca. temp. Talb. 262.

was a limitation by the settlement to the first and other sons of such son in tail male, the devise for want of heirs male of his own body might have been construed as a devise of the reversion expectant on the failure of sons of his said son, and the heirs male of their bodies, yet as there was no pre-existing estate extending to issue male of the body of B., it was impossible to consider the devise on failure of issue (generally) of the body of B., as the devise of a reversion expectant on failure of such issue, there being no preceding estate extending to that period; consequently, unless such preceding estate was raised by implication, which was not admitted, the devise to F. was not the devise of a reversion, but was an executory limitation unsupported by any preceding estate; and being not to take effect till after a general failure of issue, was therefore too remote.

"But if in this case B. had by the settlement been tenant in tail general, remainder to A. in tail male, with reversion to him in fee; then I apprehend the above devise to his daughter F. would have been a good immediate devise of, or rather out of, his own reversion in fee. For a grant of the reversion when it shall happen after the death of tenant for life, it seems, is construed a good grant of the present reversion, notwithstanding the words seem to be otherwise, and sound futurely."

In the above case of Lanesborough *v.* Fox, it was distinctly held that the words "on failure of the issue of the body of B." were not held sufficient to create in him an estate tail by implication, as he took no previous express estate by the will to which those words could have reference; nor was it surmised that by force of the same words any estate tail in remainder could be raised by implication in the issue of the body of B. as purchasers, so as to support the subsequent limitation to F. But in the case of Jones *v.* Morgan, (*k*) the implication of an estate tail was by the judges considered as

(*k*) 1 Bro. C. C. 206. 7 Bro. Ca. Parl. 130.

raised by words like those in Lanesborough *v.* Fox, though this was not adopted by the Chancellor or the House of Lords as the ground of their opinion.

In that case A. settled lands on his marriage with B. upon himself for life, remainder to trustees to support contingent remainders, remainder to his first and other sons successively in tail male, reversion to himself in fee. Afterwards having two sons of that marriage, W. and E., he made his will; and among other clauses was one to this effect,—"it is my will and meaning, that in case my said sons W. and E., or any other son or sons of mine hereafter to be born, shall happen to die respectively without any issue male of their bodies, or of the body of some or one of them, then I give and devise the remainder of all and singular my messuages, lands, &c. and the reversion and reversions, remainder and remainders, of the same premises to my brother T. for his life, without impeachment of waste, &c. subject, &c." And then the will proceeds to limit the same lands to trustees to preserve contingent remainders, remainder to M. son of T. during his life, remainder to trustees to preserve, &c. remainder to the first and other sons of M., with divers remainders over. The testator died, leaving his said wife B., and his said two sons, and two daughters by her; and one of the questions upon the will was, whether the residuary devise over to T. and his sons was not void as being a future limitation, not to take effect till after the failure of issue of persons who took no preceding estate, *viz.* of all other sons of A. by any future wife; for this limitation to T., says Mr. Fearne in his Comments upon this case, was not expressed to take effect upon failure of issue male of the testator's sons by his then wife; in which case it would have been good as an immediate devise of the reversion expectant on the estates in tail male limited to such sons by the settlement: but the words, continues that writer, were general and comprehensive, extending, in point of expression, as well to the future sons of the testator by any after taken wife, as by his

then wife, and so considered this limitation could not be a devise of the reversion immediately expectant upon the subsisting estates created by the settlement, but was a future devise without any precedent estate to support it, and consequently to be regarded as an executory devise, and as such void as too remote, being limited to vest on a general failure of issue.

The Chancellor sent the case to the judges of the Court of King's Bench, who certified their opinion to be, that the event of a second marriage was not in the testator's contemplation: but supposing that from the generality of the description the words "any after born son" should be extended to the son of any future marriage, they were of opinion that, from the manifest intent of the testator expressly declared in his will, such son must take an estate tail; consequently, they were of opinion that either way a remainder after an estate tail was devised to T., who by virtue of the said limitation, upon failure of the sons of the testator without issue male, was entitled to all the lands devised by the residuary clause in the said will for life, with remainder according to the limitations in the said will.

According to the statement of this case by Mr. Fearne, Lord Chancellor Bathurst concurred with the judges in their opinion that the event of a future marriage was not in the testator's contemplation; and, consequently, that the words "or any other son or sons" were to be restrained to sons of the first marriage. But as to raising an estate tail to any sons of a future marriage, supposing the testator to have had a future marriage in contemplation, he felt himself bound by the decision of the House of Lords in the case of Lanesborough *v.* Fox, as a direct authority against admitting such implication.

In the subsequent case of Lytton *v.* Lytton, (*l*) the point respecting the implication of an estate tail, under circumstances very similar to those of Jones *v.* Morgan, to save the limitation from the objection of remoteness,

(*l*) 4 Bro. C. C. 441.

underwent the consideration of the bench: but as it was there held that it was evident from the tenor of the bill that the testator had not his future issue in contemplation, and an indefinite failure, but meant to give an immediate estate in possession at his decease, the question as to implication remained as Jones *v.* Morgan had left it.

A limitation of personal estate after an indefinite failure of issue void.

A limitation of personal estate, to take effect after an indefinite failure of heirs or issue of the body, is also void for remoteness. Nor, indeed, can this description of property be limited over after a previous disposition to one and the heirs of his body; it being a rule of ancient standing, that if a term of years or other chattel or personal estate be given by such words as would, if it were freehold estate, create an express estate tail, such words will have the effect of vesting the absolute interest in the first taker, and the limitation to the heirs of his body, and the subsequent limitations, if any, depending upon a failure of them, will be of no effect; though if it appears, from the context of the will, that the intention was that the words limiting the property to heirs of the body after a gift for life were meant as words of purchase, and not of limitation, then the ancestor will take for his life only, and the heirs or issue will be considered as the objects of a distinct bequest. (*m*) But if a man, possessed of a term,

(*m*) The endeavour to creep out of this rule from a conviction that, by a strict adherence to it, the intention of a testator must be much oftener disappointed by it than carried into effect, has introduced differences between the cases hard to be reconciled. In the case of Garth *v.* Baldwin, 2 Ves. 646., where a real and personal estate were devised in trust to pay the profits to G. during his life, and afterwards to pay the same to the heirs of his body, the personal estate was held by Lord Hardwicke to vest absolutely in G., in virtue of the limitation to the heirs of his body. But in the case of Peacock *v.* Spooner, 2 Vern. 43, 195. 2 Freem. 114. where a long term of years was assigned in trust, (and the same rules, it is to be remembered, apply to executory assignments, trusts, and executory devises of chattels,) to permit the husband and wife, and the survivor of them, to receive the profits for so many years as they, or the survivor of them, should happen to live: and after their deaths, to the use of the heirs of the body of the wife by the husband to be begotten, the decree of Lord

devises it to one and the heirs, or heirs male, or issue of his body, and in default of such issue to another, this

Jefferies, who adjudged the whole interest to vest in the wife, was reversed by the Lords Commissioners, who held that the heir of the body took by purchase, and that the term did not vest in the wife, and go to her personal representatives; which decree of the Commissioners was affirmed in the House of Lords with two of the judges for it, and six of the contrary opinion, and see Dafforne *v.* Goodman, 2 Vern. 362. 2 Freem. 231. These cases afford no ground for the construction which was adopted in them, but subserviency to the objects of the settlement, which furnished, as was thought, satisfactory inference of intention: but in the subsequent case of Web *v.* Web, 1 P. Wms. 132., where a man on the marriage of his grandson assigned a term in trust for the intended husband for life, then for the wife for life, and after their deaths for the heirs of the bodies of A., and his said wife, and the wife died leaving issue, and her husband surviving, the entire term was adjudged to be in the husband; and so the point appears to be now settled, leaving to the above mentioned case of Peacock and Spooner an authority extending only to cases quadrating with it in its circumstances.

In the case however of Ellis *v.* Smith, 2 Bro. C. C. 570., where a testator directed his trustees to pay the interest of trust money to his nephew for his life, and after his decease gave the trust money to the issue male of his nephew, and in default of such issue to his nieces, Lord Thurlow thought it plain, that under that will the nephew took only a life interest in the fund, that the limitation to the issue was dependent on a contingency, and that the plaintiffs took the fund on the alternative of such contingency. His Lordship appeared to be of opinion, that in the case where the devise was to one for life, remainder over after failure of his issue, in which case there being a life estate to the first taker, without any express estate to his issue, but with a limitation to another in failure of such issue, it being clear that no benefit was to come to the remainderman as long as there was issue, so that the immediate interest would be undisposed of, unless the first taker was considered as taking for the benefit of his issue as well as himself, the Court would naturally imply an intention in the testator that the property should be transmissible through him to his issue, which intention would let in the rule above referred to, and give the whole interest to the first taker: but that if the testator gave the fund expressly to the issue, it might be inferred that it was intended they should take as purchasers; and the Court was not driven in its construction of the meaning of the will to the above mentioned rule, for another estate was given after the death of the first taker to other persons who might take by purchase. See Doe *v.* Lyde, 1 T. R. 593. Ex parte Sterne, 6 Ves. Jun. 159. And see also Hodgson *v.* Buffey, 2 Atk. 89.

has been adjudged to be a void limitation over. So where A. having a term of years vested in him, determinable upon three lives, devised the same to his wife for life, and after her decease to N., his son for life, and if N. should die without issue, then to B., it was held that the limitation to B. was void. (*n*)

Constructive restriction of the import of the word "heirs."

If land is devised to one and his heirs, and if he die without heirs, to another and his heirs, or if without any preceding estate, land is devised to B. on the failure of the heirs of the body of A., in both these instances the limitation over is void; yet in these cases certain restrictions may arise out of the wording of the limitations, and sometimes out of extrinsic circumstances, which may render them effectual by bringing them within the compass of time allowed them by the law.

Thus if the person to whom the limitation over is made be a near relation of, and capable of being collateral heir to the first devisee, the estate of such first devisee is restrained to an estate tail, because the limitation over, in default of heirs, being to one who may be heir to the first devisee, the law construes the word heirs to mean only the lineal heirs of the first taker; as where land was devised to J. S. and his heirs, and in default of heirs to her, then to go over to L., who was a near relation and heir to J. S., it was adjudged to be an estate tail only in J. S., because he could not die without heirs so long as L. or any of his lineal heirs existed. (*o*)

If a devise is to a man and his heirs, and if he die before he attains twenty-one then over, such limitation over is clearly good as an executory devise restricted within its proper limits.

And although where an executory devise is limited to

(*n*) 1 Vent. 79. 1 Lev. 290. Bro. C. C. 33. And see Saltern *v.* Saltern, 2 Atk. 312, 376.

(*o*) 3 Lev. 70. And see Morgan *v.* Griffiths and Others, Cowp. 234. Nottingham *v.* Jennings, 1 P. Wms. 23. Brice *v.* Smith, Willes 1. and Preston d. Eagle *v.* Funnell, *ib.* 164.

take effect after failure of issue, or generally after a dying without issue, it is simply void as being postponed to a period beyond the allowable limits: yet if the contingency of the dying without issue be so qualified as to the time of its happening that it cannot carry the suspension of the vesting beyond a life or lives in being, or the period of twenty-one years beyond a life or lives in being, such limitation is good by way of executory devise. In the Duke of Norfolk's case, (*p*) the settlor having several sons, created a term of 200 years, and declared it to be in trust for his second son, and the heirs male of his body, remainder to his other sons, provided that if his eldest son died without issue, or not leaving his wife ensient, living the second son, or that after the death of the eldest son, by failure of issue male of his body, the earldom of A. should descend on his second son; then the trust should cease as to the second son and his heirs, and be for the third son, and the heirs male of his body, with like limitations to the other son. The eldest son died without issue, living the second son, and the earldom of A. did descend to the second son; and the question was, whether the executory limitation over to the third son, upon the event which had happened, was good. Lord Nottingham held, that as it was a limitation to take effect upon a dying without issue, within the compass of a life then in being, and decreed that it was good, against the opinion of the three chief justices who assisted him. That decree was afterwards reversed by the Lord Keeper North; and that reversal again reversed by the House of Lords, who established the decree of Lord Nottingham, and settled the law upon the point as to executory trusts of a term on the same principles as are applicable to executory devises.

Thus also a devise of lands held for a term to A., and the heirs of his body, and if he should die without issue, living B., then to B., was held a good executory devise, the contingency being restricted within the

(*p*) 3 Ch. Ca. 1. Pollex. 223.

period of a life in being. (q) And again, a devise to A., and if he died without issue under twenty-one to B., was held a good limitation over by way of executory devise. (r)

An executory devise to a person in existence, for his life only, after a dying without issue generally, is good.

It is proper here to observe that though it is well established that an executory devise in tail, or in fee, to a person in existence, after a dying without issue generally, is void; yet, if an executory devise is made to a person in existence for his life only, to take place after a dying without issue, such limitation may be good, since where the future estate is limited to a person *in esse* for his life only, it must take place during that life, or not at all; and is, therefore, necessarily confined within the compass of a life in being. Thus where a term of years was limited in trust to one for his life, then to his wife for her life, remainder to A. for his life, and then to his children for their lives, and for want of such issue to B. for his life, afterwards to his children for their lives, then to S. for his life, with further limitations over; and the first devisee and his wife died, and then A. and B. both died, without issue; the question was, whether the limitation to S. was good; and it was adjudged to be good; for being to him only for his life, it followed that if all the preceding trusts did not fail in his lifetime, the limitation to him would be without avail; and so it was restricted to take effect, if at all, within the compass of time allowed to these executory limitations. (s)

This limitation may also be saved by the restriction arising from the confined duration of the estate out of which it is created.

In the case last above mentioned a restriction arises of necessity out of the circumstances of the case independently of the terms in which the limitation is expressed, which assigns the proper boundary to the period of the future vesting: but there may be also cases where though, in expression the postponement might appear to be too distant; yet the future limitation or devise might be restrained within the allowable

(q) 1 Salk. 225. Skin. 340. (r) 1 Wils. 270.

(s) Oakes v. Chalfont, Pollex. 38. And see the observations of Lord Hardwicke, 3 Atk. 449.

period by the confined duration of the estate, out of which it is to arise. As where the settlor or testator has only an estate in the subject of the limitations for the term of three lives, or twenty-one years. Here the nature and necessity of the case suggests the implication of a condition that all the limitations must take effect, if at all, pending the duration of the interest out of which they are carved. Under such circumstances, therefore, in which an executory trust or devise limited by a person seised in fee would be void for remoteness, the same might be good if made by one having an estate in the subject for lives only, or for twenty-one years. As if a leasehold for three lives be conveyed to A. and his heirs, and if he shall have no son who shall attain the age of twenty-four years, to B. and his heirs, the continuance of the lives for which the property is held assigns a necessary limit to the future interest which must take effect, if at all, before those lives are spent; and the limitation may be understood as resting on a tacit condition, that the event which is to give it effect must happen during the continuance of the lives which define the estate out of which it is created. The clause introducing the limitation must be understood, says Mr. Butler in his Notes to his edition of Mr. Fearne's Treatise on Executory Devises, (*t*) in the same manner as if it had been thus expressed, "And in case during the lives of the three persons for whose lives the lease is held, or during the lives or life of the survivors or survivor of them, A. shall die, and no son of A. shall within that period attain the age of twenty-four years, then and in that case the lands shall go and remain to B. It seems clear that in the cases under consideration a limitation over introduced in these words would be free from objection."

If a testator makes use of any words in his will which indicate an intention to confine the generality of the

So if an intention is shewn of limiting the generality of the expression "dying without issue."

(*t*) See Fearne on Conting. Rem. and Exec. Dev. edit. Butler, 500 *n*.

expression of *dying without issue,* to dying without issue *living at the time of the person's decease,* they will be so construed to effectuate the intent; and in the case of executory devises of personal estates, the courts have been much inclined to this construction where there was any ground to support it. And where there are any such grounds, it is of no consequence whether the personal estate be limited to the first devisee or legatee indefinitely, as in Forth *v.* Chapman, or for life expressly, as in Target *v.* Gaunt hereinafter next mentioned, or to such legatee or devisee, and his heirs, or heirs of his body, or issue, or children: in any of these cases the restriction above adverted to equally gives life to the limitation over. As where a term was bequeathed to H. for life, and no longer, and after his decease to such of the issue of the said H. *as H. should by will appoint,* and in case H. should die without issue then over to A.; H. died without issue living at his death; those words upon the whole of the will were construed to mean issue living at his death; because it was to be intended such issue as A. should or might appoint the term to, namely, issue *then living.* (*u*) So where a testator gave the residue of his real and personal estate to his nephews W. and G., and if either of them should depart this life, and *leave no issue* of their respective bodies, then he gave the said premises to D.; Lord Chancellor Parker observed that the devise carried a freehold as well as a leasehold. Nevertheless, he thought it might be reasonable enough to take the same word in two different senses as to the two different estates; and that as to the freehold, the construction should be, if W. or G. died without issue *generally;* and as to the leasehold, the same words might be construed to mean a dying without *leaving* issue *at the death.* (*x*) Thus also, where a term was bequeathed to T. son of D. and S. and the heirs lawful

Distinction between limitations of real and of personal estate as to the construction of intention from the words "without leaving issue."

(*u*) Target *v.* Gaunt, 1 P. Wms. 432.
(*x*) Forth *v.* Chapman, 1 P. Wms. 667.

of him for ever, but in case he should happen to die and *leave no lawful heir*, then and in that case the testator gave the premises after the death of the said T. to the next eldest son or heir of the said D. and S. T. died without issue. The Court were clearly of opinion on the authority of the last cited case of Forth *v.* Chapman, which had been uniformly followed by a series of cases down to that time, that the limitation over was good; for it was equivalent to leaving no issue at the time of his death. (*y*) But though in some cases it has been held that the words, 'if the legatee shall die without issue,' then over, in bequests of personal property, *ex vi termini*, and of themselves, signified a dying without issue *living at the death* of the first taker; yet the more modern cases agree that they are not to be so understood, but on the contrary they shall be intended to mean an *indefinite failure of issue*, unless the contrary appear from other circumstances in the will. (*z*) And even when the devise of the personal estate is to one for life expressly, and if he die without issue remainder over, such remainder is void. (*a*)

The distinction taken in Forth *v.* Chapman between real and personal estate, where the words were "without *leaving* issue," was doubted, if not denied, by Lord Kenyon, in Porter *v.* Bradley, 3 T. R. 146. who considered the words, *leaving issue*, as having a confined relation to the time of the death of the parent, in the cases both of real and personal estate: but the authority of Lord Eldon in Croke *v.* De Vandes (*b*) is decidedly in favour of the distinction taken in Forth *v.* Chapman.

(*y*) Goodtitle *v.* Pegden, 2 T. R. 720. And see Lampley *v.* Blower, 3 Atk. 398. and Shears *v.* Jeffery, 7 T. R. 589. And see especially Crooke *v.* De Vandes, 9 Ves. Jun. 197.

(*z*) Beauclerk *v.* Dormer, 2 Atk. 313, 314. Saltern *v.* Saltern, *ib.* 376. Earl Stafford *v.* Buckley, 2 Ves. 181. Begge *v.* Bensley, 1 Bro. C. C. 190. Rawlins *v.* Goldfrap, 5 Ves. Jun. 440.

(*a*) Love *v.* Windham, 1 Lev. 290.

(*b*) 9 Ves. Jun. 203.

The executory devise cannot carry the estate beyond the first generation of unborn children.

Whatever limitations and provisions by will tend to tie up an estate, and suspend the power of alienation indefinitely, or to a period beyond that to which we have adverted as the allowable limit, they are, by an invariable rule of law grounded on a principle of general policy, absolutely void. Though there should be a preceding vested estate of freehold, in which case it might not be an executory devise, still if the limitation by way of *contingent remainder* tended to a perpetuity, it would be equally ineffectual. Marriage settlements, therefore, which look to the future support of families, can extend the check upon the power of alienation no further than to the first generation of unborn children; and the only method of carrying the estate to them is by comprehending them within the compass of the estate limited to their parents, to whom for that purpose an estate tail is usually given after the life estate to the first objects of the settlement. But if a testator devise lands to A. for his life, and after his decease to his first son for life, and then to the first son of that first son for life; this attempt to prolong the suspension of the vesting of the inheritance is of no avail; though, where such a settlement is directed, the Court of Chancery will, it seems, carry the intention into effect as far as may be by making all the persons in being tenants for life, and giving estates tail to the unborn children. (*c*)

Restriction upon the accumulation of produce.

It is enacted by statute 39 & 40 Geo. 3. c. 98. that no person shall by any deed, surrender, will, codicil, or otherwise, settle or dispose of any real or personal property, so that the rents, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life of such grantor or settlor, or the term of twenty-one years from the death of such grantor, settlor, devisor, or testator, or during the minority of any person who shall be living, or *en ventre sa mere*, at the time of the death of such grantor, devisor, or testator, or during the minority only of any person who, under

(*c*) Humberston *v.* Humberston, 1 P.Wms. 332. And see 3 Bur. 1632.

the trusts of the deed, surrender, will, or other assurance directing such accumulation, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce, of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of that act, go to and be received by such person as would have been entitled thereto, if such accumulation had not been directed. Provided that the act shall not extend to any provision for the payment of debts, or for raising portions for children, or to any direction touching the produce of timber.

The great question as to the ultimate period to which these trusts for accumulation might be extended, (which depended upon the extent of time during which the vesting and power of alienation of property might be legally suspended,) was determined in the much agitated and solemnly decided case of Thelluson *v.* Woodford. (*d*) In which case there was a devise of real estates of the annual value of near 5000*l.*, and of other estates directed to be purchased with the residue of the presonal estate, amounting to above 500,000*l.*, to trustees, and their heirs, &c., upon trust, during the lives of the testator's sons, A., B., and C., and of his grandson D., and of such other sons as A. then had, or might have, and of such issue as D. might have, and of such issue as any other sons of A. might have, and of such sons as B. and C. might have, and of such issue as such sons might have as should be living at his decease, or born in due time afterwards, and during the life of the survivor, to receive the rents and profits, and from time to time to invest the same, and the produce of timber, &c. in other purchases of real estates; and after the death of the survivor of the said several persons, that the said

(*d*) 4 Ves. Jun. 227. 11 Ves. Jun. 112.

estates should be divided into three lots, and that one lot should be conveyed to the eldest male lineal descendant then living of A., in tail male; remainder to the second, &c., and all and every other lineal descendant or descendants then living of A., who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was limited, successively in tail male; remainder in equal moieties to the eldest, and every other male lineal descendant or descendants, then living, of B. and C., as tenants in common in tail male, in the same manner with cross remainders; or, if but one male lineal descendant, to him in tail male; remainder to trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B. and C. respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed that the trustees should stand seised, upon the failure of male lineal descendants of A., B., and C., as aforesaid, upon trust, to sell and pay the produce to his Majesty, his heirs, and successors, to the use of the sinking fund: the trust monies to be invested and accumulated, and the accumulation, till the purchases or sales could take place, to go to the same purposes as the rents and profits of the lands so to be purchased; with a direction that all the persons becoming entitled should use the surname of the testator only.

The validity of this will was opposed on several grounds, viz.—*As morally vicious*, being a contrivance of a parent to exclude every one of his issue from the enjoyment of even the produce of his property for nearly a century, and therefore an abuse of the allowance of the law for enabling persons to provide for the reasonable occasions of their families.—*As politically injurious*, being calculated to keep an immense property during the time aforesaid unproductive, and at the end of that period to create a fund, the revenue of which would be greater than the civil list; the probable amount of the accumulated fund of one third

being 19,000,000*l.*, and in case of a minority at the end of the period, lasting ten years, of 10,802,373*l.* more; but should the *whole* property centre in one person, with a minority of ten years, the whole accumulated fund would be 32,407,120*l.*—*As going beyond the legal boundary,* since in all the other cases the lives during which the suspense was to be continued were of those immediately connected with, or immediately leading to, the person in whom the property was first to vest, being generally the parents, and therefore seldom more than one or two lives.—*As a fraud upon the rule,* since by assigning for the period of suspense a number of lives, whose average duration was equal to a given number of years, and thus indirectly making years, not lives, to constitute the period of suspense, property might be suspended for a century. (*e*) —*As attempting to protract the accumulation during the lives of persons unborn at the time of the testator's decease,* the testator having included the lives of persons to be born within due time after his decease; and though a child *en ventre sa mere* might be considered as in existence, where the limitation was for his own benefit, and he was to take, when born, in the character of heir, or where the subject of the trusts was personal estate, yet no cases could be mentioned, the subject being real property, in which a child *en ventre sa mere* has been held to be in existence, for any purpose except to limit the estate of the first devisee, or for the actual benefit of the child himself, being the substituted devisee.—*An objection was also taken upon the grammatical construction.* But all these arguments were over-ruled; and it was considered, that as the law stood at the time of Mr. Thelluson's decease, it was perfectly settled that the absolute vesting of property might be postponed, and the accumulation of it continued, during the lives of any number of persons in being, and for twenty-one years after the survivor's

(*e*) It appeared that the probable period which it would take to exhaust all the lives assumed by Mr. Thelluson was seventy years.

decease, and a further number of months, equal to the duration of pregnancy. And that as the term of suspense and accumulation, directed by Mr. Thelluson, was confined to the lives of persons in being at the time of his decease, or born in due time afterwards; or *en ventre sa mere* at his decease, and the life of the longest liver of them, without any reference to any further number of years, it not only did not exceed, but fell short of the boundary to which, according to the rules of law, it might have been extended. This was a plain executory devise; and every executory devise was good, which did not tend to make an estate unalienable beyond the time at which the remainder-man, who was not in existence at the time of the limitation of the estate, would arrive at the age of twenty-one. The Court had no other criterion to judge of the inconvenience, except by analogy to the restraint, which the common law imposes upon the alienation of real property; and as to the point respecting the legal existence of a child *en ventre sa mere*, it was considered as decided by the case of Long *v.* Blackall. (*e*) The judges were unanimous. But it has been considered by the Legislature as expedient *in future* to restrain the power of accumulation; and therefore the statute of the 39 & 40 Geo. 3. c. 98. was passed by which, (as will be seen by referring to it in the Appendix of Statutes at the end of this Work,) the power of settling and devising property for the purpose of accumulation is restricted to twenty-one years after the death of the grantor or testator. And no person can now by any deed or will, or by any other mode, settle or dispose of any *real* or *personal* property, so as that the rents and profits or produce thereof shall be wholly or *partially* accumulated for a longer term than the life of the grantor or testator, or the term of twenty-one years after the death of the grantor or testator, or the minority of any person who shall be living, or *en ventre sa mere*, at the death of the grantor or testator; and where any accumulation is directed otherwise, such di-

(*e*) 4 T. R. 100.

rection shall be void; and the rents, issues, profits, and produce, during the time that the same are directed to be accumulated, contrary to the said act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed. But the act is restrained from applying to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of woods and timber.

A trust for accumulation carried too far is void only for the excess.

Upon this statute, however, the Court of Chancery has held, that a trust by will for accumulation beyond the period thereby allowed is void only for the excess; and, therefore, where the accumulation was directed until the age of twenty-one of the legatee, not born at the testator's decease, it was determined to be good for twenty-one years; and it was said by the present Master of the Rolls, that if an accumulation was directed to continue for twenty-four years, it would be good for twenty-one, within the determination in Griffiths *v.* Vere, (*f*) decided by Lord Eldon. (*g*) Executory devises in general, which transgress the allowed limit, are wholly void, and not for the excess only, for an executory devise is itself an infringement of the rules of the common law: but the act last mentioned introduced a restriction on a liberty anciently enjoyed, and therefore it was only with respect to the excess that the prohibition was transgressed. (*g*)

Where a devise is made of the residue of the personal estate if the party shall attain twenty-one, the profits in the mean time are construed to be given to the legatee, and are to accumulate. (*h*)

Any number of executory devises may be good in their creation. If, however, the first becomes vested, all the subsequent limitations become void.

Any number of executory devises, though of the whole interest, will be good in their creation, and may be good in event, provided they are so limited as that they must necessarily take effect, if at all, within the period of a life or lives in being, or twenty-one years, after the termination of a life or lives in being. If,

(*f*) 9 Ves. Jun. 127. And see Longdon *v.* Simpson, 12 Ves. Jun. 295.

(*g*) See Leake *v.* Robinson, 2 Meriv. 391.

(*h*) Trevanion *v.* Vivian, 2 Ves. Jun. 430.

however, the first of such executory devises of the interest in the subject happens to become vested, all the subsequent limitations are thereby rendered absolutely void; and so likewise if any one of the other limitations became vested by the failure of the limitation or limitations which were prior to it in creation, all limitations posterior to the one so become vested must fail altogether: for after the entire interest has become vested, the estate in the thing is absorbed, and any ulterior disposition would be an absurdity.

In Stephens *v.* Stephens, (*i*) the testator devised his lands after decease of his wife, to his grandson W. his heirs and assigns for ever: but in case W. should happen to die before he should attain the age of twenty-one years, then he gave the same to his grandson T., his heirs and assigns, for ever; and in case his grandson T. should happen to die before he should attain his age of twenty-one years; then he gave his said lands to such other son of his daughter M. S. by T. S. as should happen to attain his age of twenty-one years, his heirs and assigns for ever, the elder of such sons to take before the younger, one after another in order and course, as they and every of them should be in seniority of age, and priority of birth, and the several and respective heirs male of the several and respective body and bodies of all and every such son and sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, then he gave the said lands to all and every the daughter and daughters of the said T. S. by the said M. S. and to the heirs of the body and bodies of all and every the said daughter and daughters, as tenants in common, and not as joint-tenants; and for want of such issue, then he gave and devised the said lands to Sir R. S., his heirs and assigns for ever. And he gave all the residue of his real and personal estate to the said T. S.

The grandsons W. and T. both died without issue: but T. S. had a son A., and a daughter B., by his wife M. S. The Judges of the Court of the King's

(*i*) Ca. temp. Talb. 228.

Bench, for whose opinion on the effect of these limitations a case was stated, held that the estate would vest in A. at his age of twenty-one in tail male pursuant to the claim, directing the order of succession between the sons to be born. If A. should die under that age, it would vest in any other son of M. S. by T. S. who should attain twenty-one, in the same manner as it would have vested in A.; and if A. died under that age, and there should be no such other son, who should attain that age, the estate would go to B., and all the daughters of the said T. S. and M. S. as tenants in common in tail, with remainder to the said Sir R. S. in fee: and if A. should die under that age, and B. should then be dead without issue, and there should be no other son of T. S. and M. S. who should attain the said age, nor any other daughter of T. S. and M. S., then the estate should go to Sir R. S. in virtue of the remainder so limited to him in fee-simple.

Different consequence as to the subsequent limitations where the preceding limitation carries the whole fee, and where it carries a less estate.

From the case last noticed we observe that where the whole interest was carried by the preceding limitation, a subsequent limitation was not considered as intended to succeed to it or to take effect after it; but to come in upon its failure, in lieu of it, at the same moment of time. If in such a case the prior estate should come into existence, the succeeding limitations must necessarily fall to the ground, as has above been mentioned. But in the same case we may observe, that where the preceding executory limitation did not carry the whole interest, it would not by becoming vested annul the succeeding limitation which might then take effect as a vested interest in remainder expectant upon the preceding estate. Thus if the estate tail in B. had become vested, the executory estate in Sir R. S. would thereby have become a vested remainder in fee; and had all the preceding estates failed of taking effect, Sir R. S. would have taken an estate in fee in possession, which would have had its effect at the time limited for the preceding estates to vest. All the estates therefore were

contemporaneous as to the time of their vesting, if they could ever vest at all; and that time was within the allowable limit to which the period of vesting could be postponed. The rule is thus satisfied, as to all the executory estates. During the suspense of the preceding limitation, if it carries the whole interest, the succeeding limitation is good as an executory devise, depending for its effect upon the prior estate not taking effect at all. If the prior estate does not involve the entire interest, the subsequent limitation, during the suspense of the preceding limitation, is capable of becoming a regular remainder, should the preceding limitation become vested; or of becoming an estate in possession, should such preceding estate never take effect at all.

So in the case of personal estate, though if a term be given by will to a man and the heirs of his body, or to one and his heirs male, or his issue male, the whole estate vests in such devisee; yet if such limitation is executory, and on a failure thereof the estate is limited to another, such devise over is construed as an alternative limitation, and will take effect if the first estate never comes into existence at all. Thus, (*j*) where a term of years was settled in trust for the husband for life, then to the wife for life, then to the first son of the marriage, and the heirs male of his body, and in the same manner to all the other sons successively, and for want of sons then to daughters; the husband and wife died without having had any son, but leaving a daughter; and the question was whether she could take under this limitation, it being after a limitation in tail to the sons. Lord Chancellor Cowper held that if the limitation to the sons had taken effect, the limitation to the daughters must have been void: (*k*) but as there was no son, the latter limitation was good, for the construction must be, if a son then to him, if no son then to a

(*j*) Higgins *v.* Dowler, 1 P. Wms. 98.

(*k*) See Britton *v.* Twining, 3 Meriv. 176. where this point was well settled.

daughter. If, after the limitation to the sons, the devise over to the daughters had been in default of issue male of the husband, the husband would have taken an estate tail, and then the limitation over would have been void; as was the case according to the reading of Salkeld; (*l*) which however was a mistake in that reporter, as was observed by Sir Joseph Jekyll, in his learned argument in Stanley *v.* Leigh. (*m*)

As the subject was personal, and the husband took an express estate for life, it did not follow, observes Mr. Fearne, that if the limitation had been worded as above supposed, the husband would have taken an estate tail by words of implication, as the words 'in default of issue male,' might well have referred to such default of issue male, as was before expressed. (*n*)

And in another case, (*o*) where there was a devise of an estate to A. for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A. in tail male, remainder over to B.; and the testator willed that his plate, jewels, library of books, and furniture of his mansion-house, should go as heir-looms, as far as they could by law, to the heirs male of his family successively, as his real estate was thereby settled and A. died without issue; the question was, whether the limitation of the plate, &c. was good in the event, A. never having had any issue. It was agreed that the clause respecting the plate, &c., by referring to the settlement of the real estate, amounted to the same thing as if the chattels had been expressly limited to A. for life, remainder to his first and other sons in tail male, remainder to B.; and upon that ground it was contended that the limitation to B. was void after a

(*l*) See Salk. 156.

(*m*) 2 P. Wms. 686.

(*n*) See Lampley *v.* Blower, 3 Atk. 396. Warman *v.* Seaman, Fin. C. R. 279. 2 Cha. Ca. 208. and Clare *v.* Clare, Ca. temp. Talb. 21. See also Fearne on Ex. Dev. p. 373. 409.

(*o*) Gower *v.* Grosvenor, Barnard. 54. and see Trafford *v.* Trafford, 3 Atk. 347. edit. Sanders, and cases cited in the note.

limitation in tail to the sons. But Lord Hardwicke though he did not decide the point, adverted to the great difference which, in the reason of the thing, there appeared to him to exist between such sort of limitations vested, and the like limitations when contingent; as if a personal estate were bequeathed to A. for life, remainder to B. (a person in existence,) and the heirs male of his body, remainder to C.; the whole remainder in such a case would be vested in B., and C. could never take under such a limitation: but if the first remainder were contingent in its creation, then the remainder over to C. would be good or bad, according to the event of the contingency.

It must be remembered, however, that in the description of cases just above enumerated the limitations in question were saved by a construction which confined them to the period of a life or lives in being and twenty-one years afterwards; but that wherever a future estate is limited to take effect at a period beyond the compass of time to which executory limitations are restricted as aforesaid, they are void both at law and in equity. (*p*)

It will be proper also to observe in respect of the limitation after a fee above treated of, that the ground on which it has been supported has been its dependence on an alternative which must decide between it, and the preceding estate at the same time, and that time within the compass to which the law allows the vesting of estates to be suspended. And therefore, if the preceding estate be already vested, then the future limitation cannot be merely an alternative, but must be considered as limited to take effect after the determina-

(*p*) With respect to such executory limitations of freehold estates as succeed to vested estates, the objection of remoteness will only apply to those which are attempted to be created after devises of inheritances in fee; for if they are limited to take effect after vested *estates in tail*, they may always be defeated by a common recovery, as has been before noticed, and therefore no danger of perpetuity can arise from the suspension of the vesting of such limitations.

tion of the preceding estate; or, if there be none such, then as a limitation to take effect simply upon the happening of some future event; and if on either supposition the future vesting is postponed beyond the limit above adverted to, such future limitation is void in its creation, and cannot be made good by any subsequent accident.(*o*)

With respect to such contingent limitations under wills as turn upon conditions annexed to preceding estates, a few further observations occur as necessary to complete this part of our subject.

Where the contingency attached to the first estate extends to the subsequent limitations, and where it does not.

A contingency may act only on the estate to which it is first attached; or it may reach the subsequent limitations, and this is often a question as difficult as it is important. There are three suppositions under which the subject may be viewed. First, The contingency or condition itself may never arise, happen, or be performed; and under this event it may become a question whether the condition was intended as a condition precedent to give effect to the ulterior limitations. The case of Napper *v.* Saunders, (*p*) where the point arose upon a conveyance to uses, involves the principle under consideration. There A. made a feoffment to the use of herself for life, and then to the use of the feoffees for eighty years, if B. and C. his wife should so long live; and if C. survived B., then to the use of C. for life; and after the decease of C. to the use of D. in tail, with remainders over. C. died before her husband, so that the contingency on which her remainder for life was to take effect never happened; and one of the points was, whether the contingency upon which C.'s life estate was to depend, *viz.* her surviving her husband, extended to all the subsequent remainders. It was resolved that the subsequent remainders did not depend on the contingency of C.'s surviving her husband: but

(*o*) Sabarton *v.* Sabarton, Ca. temp. Talb. 245.
(*p*) Hutt. 119.

was to take place at her decease whether she survived him or not; and that, therefore, the remainder to D. was a present vested remainder. (q)

And again, where A. (r) devised lands to his daughter for life, remainder to trustees to support contingent remainders, remainder to her first and other sons successively in tail; and if his daughter should depart this life without issue of her body living at her death, then he devised the lands to trustees and their heirs, until his cousin N. should attain his age of twenty-one years,(s) upon trusts, &c., and gave and devised the lands to his cousin N. after he should have attained his age of twenty-one years for the term of his life, remainder to trustees to support contingent remainders, remainder to the first and other sons of N. successively in tail; and in default of such issue, or in case N. should die before twenty-one and without issue, remainder over; it was held by Lord Hardwicke that the contingency of the daughter's dying without issue living at her death affected only the estate limited to trustees until N. should attain twenty-one; and that the estate limited to N. was only contingent until he should attain twenty-one,

(q) It was also a question in this case whether the remainders over were not to be deemed contingent in respect of the possibility that the preceding estates might determine before the event should happen on which these remainders were to take effect, *viz.* the death of C.; for C. and her husband might both outlive the term of eighty years; and then supposing A. to be dead, there would be no preceding estate subsisting, and the time limited for the remainders to take effect would not yet have arrived. But notwithstanding this possibility, on the strength of the great improbability of the wife's life exceeding the term of years determinable thereon, it was held that the remainders should not be considered contingent but vested. See Lord Derby's case, Litt. Rep. 370. and see Lord Hale in Weale *v.* Lower, Pollex. 67.

(r) Lethieulier *v.* Tracy, 3 Atk. 774.

(s) The limitation to the trustees was not an absolute but a determinable fee; and it appears by this case that a contingent determinable fee, devised in trust for some special purposes only, will not prevent a subsequent limitation to one *in esse* from being vested.

which contingency extended to none of the subsequent estates; and, therefore, the ulterior limitations were vested remainders.

So where (*t*) a testator had three sisters, one of whom was married to W., and devised to trustees and their heirs, in trust that they and their heirs should, during the life of the married sister, receive the rents and profits, and pay the same to the two other sisters, their heirs and assigns, and from and after the decease of the husband in case the married sister should be then living, to the use of the three sisters severally in thirds for their respective lives, with remainders severally to their first and other sons in tail, remainder to their daughters as tenants in common, with cross-remainders between the sisters in default of issue of their bodies respectively, remainder over in tail; the condition of the married sister's surviving the husband was held not to extend to any of the limitations subsequent to her estate for life; and the remainder-man in tail was considered competent alone to make a good tenant to the præcipe, upon the death of the three sisters without issue, notwithstanding the husband W. was then living.

It appears however that the decision in these cases turned upon the apparent intention of the testator to confine the condition to the estate expressly made subject to it; and we are to observe that where such intention to restrict its application is not to be collected from the will, as if there is no apparent distinction between such estate, and those which follow, the condition or contingency will extend its effect to all the succeeding limitations. The learning upon this point was well exemplified in Doe *v.* Shippard (*u*) where the devise was to trustees to pay twenty pounds of the rents and profits to the testator's daughter, and the rest to her hus-

(*t*) Horton *v.* Whittaker, 1 T. R. 346.
(*u*) Dougl. 75.

band, and the whole rents and profits to the husband after the daughter's death, and in case the daughter should survive her husband, then to the use of the daughter for life; and after her death to the use of her son in tail, remainder to the heirs of the body of the husband; there, the daughter dying before her husband, so that the contingency annexed to the limitation to her never took effect, the devises over were adjudged to have all failed, the contingency not being confined to her life estate, but extending to all the other limitations, and operating with respect to them as a condition precedent. It appears indeed by the words of the will that the contingency was as applicable to the succeeding limitations, as to that with which it was in expression more immediately connected; for the trustees were, in the event of the wife's surviving the husband, to stand seised of the land in trust to the several uses, intents, and purposes, in the will aftermentioned; and there was nothing to connect the condition with the daughter's estate more than with those which were limited in succession to it.

Davis *v.* Norton (*v*) is also an instance of the same kind. A. seized of lands in fee simple, and having a son B., and a sister C., devised the same to his son B. in tail general, and if his son B. should die without issue, and his wife should survive him, then the wife should enjoy the premises for her life, and after her decease that the same should be enjoyed by M. S. for her life, and after her decease, (B. being dead without issue, as aforesaid) then to C. in fee. B. the son died without issue, the testator's wife having died before him; and it was held that C. was not entitled to the remainder in fee, because the contingency was annexed to all the devises over. It is to be observed, however, that some stress was laid upon the words between brackets, especially on the words, 'as aforesaid,' which implied a repetition of the clause,

(*v*) 2 P. Wms. 390.

"in case my son dies without issue, and my wife should survive him."

Where the preceding estate to which the contingency is annexed does not take place.

The cases just above referred to have been those wherein the point has arisen upon the failure of the contingency or condition annexed to the preceding estate, the question being how far succeeding estates were to be considered as depending upon such contingent event as a condition precedent to their taking effect: but, on the supposition of the prior estate itself not coming into existence to which the condition or contingency was annexed, the consequence to the subsequent limitations comes under another consideration.

Thus where A., (*x*) possessed of a term of years, devised it to his wife for life, and after her death to the child she was then *enseint* with, and if such child should die before the age of twenty-one, then one third part of the said term to his said wife, and the other two-thirds to other persons, one of the points in the case was, whether this devise to the wife was good in the event; for the wife happened not to be pregnant; and thus the contingency upon which the limitation to her was grounded, *viz.* the death of the child under twenty-one, did never happen, the estate to which it was annexed never having come into existence; and the Chancellor Lord Harcourt held it a good devise.

In a subsequent case, Avelyn *v.* Ward, (*y*) Lord Hardwicke adverted with approbation to the last mentioned case as a strong authority for the doctrine he there maintained. In this latter case, A. devised his real estate to his brother B. and his heirs, on condition that B. should give a release within three months to the trustee therein named of all demands which he might claim on the estate of the testator: but if his said brother should neglect to give such release, the said de-

(*x*) Jones *v.* Westcombe, 1 Eq. Ca. Abr. 245.
(*y*) 1 Ves. 420.

vise to him should be null and void to all intents; and in such case he devised the estate to Richard Ward his heirs and assigns for ever. B., the first devisee died, in the testator's lifetime, and it was contended against the claim of Richard Ward that the event on which his estate was to arise was a strict condition, and that a breach thereof was necessary to give effect to the limitation over, which breach could not happen unless the estate first vested in B. But Lord Hardwicke considered the devise over as a conditional limitation, adding that he knew no case either of a proper remainder after a particular estate, or of a conditional limitation after a fee, in which if the precedent limitation, by any means whatsoever, was out of the way, the subsequent limitation would not take place.

It appeared to be a point conceded in the above case that if it had been that of a remainder limited conditionally after a particular estate which had never taken effect, the construction in favour of the vesting of the remainder might be well grounded: but Lord Hardwicke denied any distinction in this respect between a remainder over after a contingent particular estate only, and an executory devise limited after a disposition of the entire fee.

No distinction between real and personal estate as to this point.

Nor does there appear to be any distinction as to this point between executory limitations of real and of personal estate after preceding interests, with conditions annexed. Jones *v.* Westcombe, above cited, was a case of personalty; and Fonnereau *v.* Fonnereau (z) was a case of the same class; in which last case the subject of the disposition was a sum of money, and the limitation over was in the event of issue of the testator's children all dying under the age of twenty-one, without supposing the case of there being no issue at all, as was the fact with respect to one of the children.

And again in Andrews *v.* Fulham, (*a*) Lee, C. J.

(z) 3 Atk. 315. (*a*) Cited 1 Ves. 421.

delivered the opinion of the Court, "That the limitation over was good; for the devise to the infant being ineffectual was out of the case; and the law was the same whether the devise immediately preceding the limitation over was originally void, or became so by the non-existence of the person contemplated." And in Gulliver *v.* Wicket, (*b*) Lee, C. J. again delivered the opinion of the Court of B. R., that the devise over in that case was to be considered as a limitation subsequent; and the first, as a preceding limitation which, in whatever way it was laid out of the case, gave effect to the other.

So in the case of Scatterwood *v.* Edge, (*c*) where a testator devised land to trustees for the term of eleven years, remainder to the first and other sons of A. successively in tail male, provided they should take the testator's surname; and in case they or their heirs should not take the testator's surname, or should die without issue, remainder to the first son of B., remainder to the right heirs of the devisor. A. had no son at the time of the devise, and died without issue; B. had a son at the time of the devise, who took the surname of the devisor; and it was resolved that the limitation to the first son of B. took effect, and that the preceding limitation to the first son of A., which was an executory devise, with the annexed condition, did not operate as a precedent condition, but that the condition was part of the limitation.

And in Doe *v.* Brabant, (*d*) the doctrine under our immediate consideration was thus stated by Lord Thurlow:—"Wherever the prior estate is made to depend upon any described event, and the second estate is made to depend upon the determination of that estate, the first is not to be taken as a condition precedent; but upon its failure the second estate must take place."

We may suppose also a class of cases wherein a subsequent estate is limited to take place upon the deter-

(*b*) 1 Wils. 105.
(*c*) 1 Salk. 229.
(*d*) 3 Bro. C. C. 393.

Where an estate is limited upon the termination of a preceding estate, by a contingency which never happens, in what cases the devise over will take effect on the natural expiration of the first estate.

mination of a preceding estate by a contingency; there if the preceding estate comes into existence, but the condition or contingency fails of being performed or happening, a question may arise whether the limitation over shall take effect at the proper and natural expiration of the first estate. Upon which point the doctrine furnished by the cases appears to be this,—that where it can be plainly collected from the will that the apparent general purpose of the testator requires that such should be the effect of his dispositions, the construction should be agreeable to such indications of intention; but that without such indications the subsequent limitations should be considered as depending upon the anticipated determination of the precedent estate.

In the case of Luxford *v.* Cheeke, (*e*) the testator devised his estate to his wife for her life, if she should not marry again; but if she did, then that his son H. should presently after his mother's marriage enter, and enjoy the premises to him and the heirs male of his body, remainder to the testator's other sons successively in like manner, remainder over. The wife survived the testator, and died without marrying again; and the question was, whether the condition not having been performed, the remainder to the sons in tail took effect; and the Court held that such remainder did take effect, relying principally upon the apparent scope of the will, which was to create an estate tail. They considered the devise to the wife to be the same as a devise to her during her widowhood, with a regular remainder over to commence on the determination of that estate by marriage or death.

In Sheffield *v.* Lord Orrery, (*f*) the testator devised his house, &c. to his wife for life, upon this express condition only, that if she should marry again, then his will and meaning was that the house should go forthwith to his eldest son and his issue; and if all his issue male should die, remainder over. The difference

(*e*) 3 Lev. 125. (*f*) 3 Atk. 282.

between this wording of the condition and limitation over, and that which was made use of in the above mentioned case of Luxford *v.* Cheeke, appears to be very minute, and to afford a very subtle ground for the different judgment pronounced by Lord Hardwicke in that case. But his Lordship declared that the cases appeared to him to differ in substance, for that there were no words in Luxford *v.* Cheeke that could substantiate the testator's intent without construing it an estate tail, but that in the case before him there was no necessity for such a construction, and that the intent of the testator would be more effectually answered by the construction which he adopted.

It is quite clear, however, that it is always competent to a testator so to word the limitation as that it may take effect either upon an event which may determine the preceding particular estate before it could otherwise determine, or as a regular remainder expectant upon the determination of the preceding estate by the accomplishment of its full period of duration. And where the meaning is not thus expressly announced, the intention, if it can be collected from the general scope and objects of the instrument, will prevail, and govern the judicial construction.

If a prior limitation is void for remoteness, a subsequent limitation will be void though the object of the first should not come into existence.

If, however, a prior limitation is void for remoteness, being suspended upon an event at a distance in time beyond the limits to which we have before adverted, a subsequent devise limited to take effect on the failure of such precedent estate will be void in its first creation, and will not become good though the object of the first limitation should never come into existence: which important point was first judicially determined in the case of Proctor *v.* The Bishop of Bath and Wells, and others, reported by H. Blackstone. (*g*)

The case was shortly this:—Mary Proctor being seised of the advowson of W. C. by her last will devised the same unto the first or other sons of her

(*g*) 2 H. Bl. 355.

grandson, Thomas Proctor, that should be bred a clergyman, and be in holy orders, and to his heirs and assigns, all her right of presentation to the said rectory, &c.: but in case her said grandson, the said Thomas Proctor, should have no such son, then she gave and devised the said right of presentation unto her grandson, the said Thomas Moore, his heirs and assigns, for ever. The testatrix died so seised, leaving the said Thomas Proctor and Thomas Moore her surviving; and then Thomas Proctor died without ever having had a son; and the question was whether the limitation to Thomas Moore was good in the event which had happened. It was contended for the claim of Thomas Moore, that the intention of the testatrix clearly was to exclude her heir at law, and that the Court would construe the will in furtherance of that intention, and would not presume that she meant that the son of Thomas Proctor should be in such orders which would defeat it, instead of those which might carry it into effect. As by means of a faculty or dispensation he might take deacon's orders at twenty-one, the Court would intend that those were the orders which she had in contemplation. But supposing the prior devise to be bad, that there was nothing to render void the devise to Moore; that the limitations in the will were alternate: that if Proctor should have a son in orders to take as devisee, Moore would be entirely excluded: that this case therefore was not like those where the second devise was to take place, after the first had been satisfied. That it was a rule that where there were two limitations in a will, and the former was avoided either from the nature of its original creation, or by matter *ex post facto*, the latter should have effect, for which were quoted the above mentioned cases of Avelyn *v.* Ward, Scatterwood *v.* Edge, Jones *v.* Westcombe, Gulliver *v.* Wickett, and others, (wherein, however, as we may remember, the limitation to which the contingency was annexed was restricted to take place within the allowed period;) and in addition to the above

topics it was urged that as Moore was *in esse* at the death of the testatrix, and there was then no son of Thomas Proctor, the advowson vested in Moore, subject to be divested by the birth of such son.

But on the other side it was argued that the first devise was not within the limits to which such executory limitations were restrained by the law. Thomas Proctor had no son born at the death of the testatrix; he could not therefore have had one who could have taken orders within twenty years after his birth according to the age prescribed by the canon of the church, which does not allow deacon's orders before twenty-three, nor the ordination of a priest until the age of twenty-four. That the statute 13 Eliz. is positive against the admission to a benefice with cure till twenty-three at the least, and that it was clearly the intention of the testatrix that the son of Thomas Proctor should be himself presented to the living. It was further contended that this being so with respect to the first limitation, the devise over to Thomas Moore was liable to the same objection on account of the remoteness of the contingency; for supposing there had been no previous devise to the son of Thomas Proctor, the devise to Thomas Moore would be to him, if Thomas Proctor should have no son in orders; and such devise being void in its original creation, could not be made good by the circumstance of Thomas Proctor having no son, which was the doctrine established by the case of Goodman *v.* Goodright. (*h*) And, lastly, that the rule of law was, that an executory devise must be such as that it must necessarily vest, if at all, in the devisee, within the compass of a life or lives in being, or twenty-one years after,—not that it may by a bare possibility vest within the said period.

The Court held clearly the first limitation void, and that the devise over to Moore depending upon the same event was also void; for the words of the will would

(*h*) 2 Burr. 873.

not admit of the contingency being divided; and that there was no instance in which a limitation after a prior devise, which was void by the contingency being too remote, had been let in to take effect, but that the contrary had been expressly decided in the House of Lords, in the case of the Earl of Chatham *v.* Tothill; (*i*) and accordingly the heir at law of the testatrix was held to be entitled.

Of the matter of the contingency.

With respect to the matter of the contingency, or condition itself, there are some rules and restrictions to which it must of course be subject; the first and most obvious of which is, that it must not be in contravention of the law, or the plain principles of public policy. A limitation, whether by way of contingent remainder or executory devise, cannot be made to depend upon a possibility which is not within the compass of reasonable expectation. The possibility or expectation of a thing which is against law is, as was laid down by the Judges in Cholmley's case, (*k*) *potentia remotissima et vana,* which by intendment of law *nunquam venit in actum.* Thus a limitation to a child illegally begotten, but not *in esse,* is void, as has already appeared. (*l*)

Must not be against law, or the policy of the law.

Interests to determine upon acts of bankruptcy.

As between landlord and tenant, a condition of reentry may be reserved to the latter upon an act of bankruptcy committed by the former. (*m*)

And an annuity may be made determinable upon a like event, so as to withdraw it from the creditors. (*n*) In Lockyer *v.* Savage, (*o*) the wife's fortune was by the settlement made previous to the marriage vested in trustees for the husband during his life, with a proviso that if he failed in the world, the husband should no longer receive the interest, but that it should be for the

(*i*) 6 Bro. Ca. in Parl. 451. And see the opinion of Sir W. Grant, M. R. in Cambridge *v.* Rous, 8 Ves. Jun. 12, 24.

(*k*) 2 Rep. 51.

(*l*) Vid. *supra,* 83.

(*m*) Roe *v.* Galliers, 2 T. R. 133.

(*n*) Dommett *v.* Bedford, 6 T. R. 684. 3 Ves. Jun. 149.

(*o*) 2 Str. 947.

separate maintenance of the wife, and on the husband's bankruptcy, this provision was held good against the claims of the creditors, not having been derived out of the bankrupt's estate, but out of the wife's fortune. And it does not appear that the law has yet carried the relief further than the principle of these cases. (*o*)

A limitation depending upon two possibilities void for remoteness.

In Cholmley's case above cited it was said by the Court, that the possibility on which a remainder is limited must be *potentia propinqua*, as coverture, dying without issue, and the like. A distant possibility or *potentia remota*, or a double contingency, not alternative and concurrent, but the one to succeed the other, and both to precede the vesting of the estate, will not be endured by the law. Thus a remainder to a corporation not yet created, even though it should be created during the particular estate, would be void. (*p*) So a remainder to the heirs of a person named or described, but not in existence, would be bad in law, because in such a case two contingencies would be necessary to give effect to the limitation:—the person designated as the ancestor, whose heirs were to take by virtue thereof, must both come into existence, and go out of existence during the continuance of the particular estate; which is called a possibility upon a possibility. So a limitation to the children of unborn children is void for remoteness, whether it be intended to take effect as an executory devise, or as a contingent remainder with a preceding freehold to support it.

A condition or contingency may be void for repugnancy, or inconsistency.

A repugnancy in the condition or contingency to the nature of the grant to which it is annexed makes such condition void; and so likewise if there be any contrariety or inconsistency in the condition itself. An estate cannot be modified in respect of the enjoyment so as to be made to devolve or enure in a manner inconsistent with its nature and quality, for this would be to change the law of the land; so neither can it be made to cease or deter-

(*o*) 2 Stra. 947.

(*p*) 2 Rep. 51. Hob. 33. 4 Leon. 223. Cro. Car. 575. 1 Jones 452. 3 Mod. 29. 1 Rep. 51.

mine as to part only, and continue for the residue. Thus a proviso that the estate of tenant in tail shall upon a certain event cease for his life only is void, though without doubt the whole estate may be limited to become void, in an event prescribed; so a condition annexed to a feoffment in fee, that if the feoffee die, his heir being under age, his estate shall cease during the minority of the heir, is void. Nor will a condition be allowed to operate to annul or abridge the properties or incidents belonging, by its legal constitution, to an estate in land. Thus the power of alienation by a common recovery is an incident of an estate tail, which cannot be restrained by any condition or limitation. (*q*) But this must be understood with reference to the regular and legitimate modes of alienation, for as with respect to any tortious or wrongful mode of aliening or endeavouring to alien, such restraining conditions or limitations over would undoubtedly be good. Thus a tenant in tail may be restrained by a condition from levying a fine at common law, or making a feoffment of his lands. (*r*)

We shall in the last place observe, that these executory devises, as well as contingent remainders, are transmissible to the representatives of the person to whom they are limited, if he die before the contingency happens. Thus where there was an executory devise to A., and his heirs, and if he should die before twenty-one, then to B., and his heirs; B. died before A., who died before twenty-one; and it was considered a clear point that the heir of B. might well take under the executory devise. (*s*) And where legacies were devised to children to be transferred to them at their respective ages, or days of marriage, and that in case any of them should die under that age, or marry without consent, &c. his or her share should go to the others

(*q*) Mary Portington's case, 10 Rep. 36. And see Co. Litt. edit. Harg. and Butl. note 223 *b*. 9 Rep. 128. Pierce *v.* Win, 1 Vent. 321.

(*r*) Co. Litt. 224 *b*. Croker *v.* Trevithen, Cro. El. 35.

(*s*) Vin. Vol. VIII. p. 112. Ca. 38.

at their ages of twenty-one: Lord Hardwicke held that a share accruing by the forfeiture incurred by a child marrying without consent vested in another child who attained twenty-one, but died before such forfeiture, so as to entitle the personal representative of such deceased child to an equal portion thereof with the other surviving children. (*t*) So in another case where a testator devised lands to his son A., his heirs and assigns, and if he should happen to die under twenty-one, leaving no issue, then he devised the lands to his the testator's mother B. in fee. The testator died, and then his mother died in the lifetime of A., who afterwards died under twenty-one, and without issue; and it was held that the lands vested in the heir at law of B. upon the happening of the contingency, *viz.* the death of A. under age, and without issue. A. was the heir at law of B., but his death was the contingency: and according to a rule of law, the estate vested in the person who was heir at law of B. when the contingency happened. B. could not properly be seised of the estate as purchaser till the contingency happened; and the rule being that he who claims by descent must shew himself to be heir to the first purchaser, the property in question could not descend to A. who was not *such* heir, but attached in the person who was heir to B. after the accruer by the happening of the contingency. (*u*)

SECT. III.

Powers and Authorities.

POWERS and authorities are also subjects of devise as well as estates and interests. And these powers and authorities may either be substantive and independent,

(*t*) Chauncey *v.* Graydon, 2 Atk. 616.

(*u*) Goodright *v.* Searle, 2 Wils. 29. And see Co. Litt. 11 *b.* 3 Rep. 42.

or coupled and connected with an estate or interest in the subject to which they relate. A power of selling, letting, or managing an estate may be given by will, separate from all right of possession and enjoyment: as authorities to executors to sell, which were common in practice at an early period. In the case of Townsend *v.* Walley, (*x*) which happened not long after the statute of Wills, it was a question before the judges, whether an authority to sell lands was within those statutes, as thereby only a person *having lands* was enabled to devise the same to *another person:* but the judges were of opinion that it was lawful within the statutes of Wills, by the equity thereof, to devise an authority to sell lands.

Of naked authorities.

Where a testator devised that his executors should sell his lands, or directed that his lands should be sold by his executors, or empowered A. and B., whom he appointed his executors, to sell his lands, such authority was said to be a naked authority, because it was uncoupled with any interest in the thing itself. In such a case until the sale, the legal estate of inheritance would descend to the heir. And such naked authority is not liable to be affected by any alienation of the heir, who could not intercept or avoid it by his feoffment; nor if such heir were disseised, and the disseisor should die disseised, would such a circumstance oppose any legal obstacle to the exercise of the power.

Nor can the executors themselves release such a power; for they have no right or title to release, but a bare authority. (*y*) The authority to sell is a personal trust; and as authorities of this kind must be executed according to the limitations accompanying it, only those to whom it is given, and no others, can carry it into operation. If, therefore, a testator has given this power to two persons named, whom he has also made his executors, if one of these die before the authority is exer-

(*x*) Cro. El. 341. Litt. s. 169. Co. Litt. 112 *b*. 113 *a*.
(*y*) Co. Litt. 265 *b*.

cised, it has been said the survivor cannot give effect to it, for it was entrusted to two. (z) So neither can the executors of such persons execute the power. And if the authority be given to executors generally as such, to be exercised with the consent of a person named, and such person die before the trust is exercised, the authority fails for want of the constituents necessary to give it validity. (a) But if such power were given by a testator generally to his executors, and he then made three his executors, and one died, the survivors when the land was to be sold might sell, in virtue of their official character, as being the persons contemplated by the testator. (b) Thus where a man having five sons-in-law, devised to his own son in tail, and if he should die without issue, that his *sons-in-law* should sell and distribute among his daughters, and one of the five sons-in-law died, and then the devisor died without issue, it was adjudged that the surviving sons-in-law might well sell; the difference being between the cases where in giving the power the persons intrusted are specially named, and where they are designated only by description. (c)

Mr. Hargrave's note on the passage of Lord Coke's Commentary, from which the above distinctions are borrowed, is replete with just observation. Lord Coke remarks, that if a will devises that executors shall sell land, such a devise *passes no interest*, but merely an authority which *will not survive*. But Mr. Hargrave observes that both these positions are controvertible: for Lord Coke in other places considers that if one devises lands to be sold by his executors, an interest will pass; and the distinction between such a devise, and a devise that executors shall sell the land, wears the appearance of too curious and strained a refinement. Still, however, it has pretty constantly prevailed in our courts of law.

(z) Jenk. Cent. 44.
(b) Bro. Dev. 31.
(a) Dyer 219.
(c) Co. Litt. 113 a.

The strict notion that naked authorities will not survive is certainly with Lord Coke, though the above named very learned annotator has shewn that there are respectable opinions against that doctrine. But "whether," continues he, "Lord Coke's notion of the power's not surviving, or the opposite one, most conforms to strictness of law, is not now of any great importance, as such a power, though extinct at *law*, would certainly be enforced in equity. This has long been the practice of our courts of equity; which rightly deem the purpose for which the testator directs the money arising from the sale to be applied, to be the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees; which brings the case within the general rule of equity, that a trust shall never fail of execution for want of a trustee; and that if one is wanting, the Court shall execute the office. The relief is administered by considering the land, in whatever person vested, as bound by the trust. (*d*)

It should be noticed, however, that the little importance attached by Mr. Hargrave to the distinction between the devise that the executors should sell the land, and the devise that the land should be sold by the executors, on account of the aid and effect given by the Court of Chancery to all such cases, has been said by a writer of ability to be grounded on a view of the extent of that interference not altogether correct. (*e*) He contends that many cases might be put, in which a court of equity could not interfere to supply a defect for want of proper parties to execute such an authority; and he supposes a case to illustrate his observation, for which we must refer to his book. (*f*)

Where a power to sell was given by a testator to his

(*d*) See the entire note 146, to Co. Litt. 113 *a*.

(*e*) See Pow. on Dev. 302.

(*f*) Mr. Powell argues on the assumption that the verbal distinction to which Mr. Hargrave so justly imputes the character of over-refinement is settled law.

executors generally, without naming them, if the property to be sold was leasehold, there could never have been much doubt that any one of the executors might in the lifetime of the rest, alien the legal estate, without their concurrence; not by reason of their interest as trustees, for as trustees they would be merely jointenants of the legal estate, and could by their separate acts as such only sever the jointure and alien their respective undivided shares; but the particular power might in such a case be said to flow into their legal character as executors, or rather perhaps to give place and precedence to the general power which executors possess, *ratione officii,* over all chattels. It was a doubt, however, at common law, where the property was freehold, as appears by some of the books, and particularly by the recital of a statute, which will be presently mentioned, and which was made to put an end to these doubts, whether if one of the executors had refused to sell, the others could execute the power. Lord Coke indeed says, they clearly could not, till the enabling statute of 21 Hen. 8. c. 4. That statute, reciting that according to the opinion of divers persons, (*g*) where a testator had devised his land to be sold by his executors, a bargain and sale would in no wise be effectual, unless made by the whole number of the executors, for remedy thereof enacted, "that all bargains and sales by those that accept the charge, without the rest, shall be as good and effectual in law as if the rest had joined." Which statute has always been interpreted liberally, as a very beneficial law. And though it expressly provides only for cases where the lands are willed to be sold by the executors, yet the settled construction has extended it to cases where the will devises the lands to executors to be sold by them.(*h*) Though it should be remembered that, in neither of the above mentioned cases, if one refuse, can the other

Whether where one executor refuses to execute the power of sale, the rest may sell.

Of the enabling statute 21 H. 8. c. 4.

(*g*) See the remark of Lord Kenyon on this statute, that the law was considered as doubtful, 6 T. R. 396.

(*h*) Co. Litt. 113 *a*.

executors sell the land to him that refuses; because he is party and privy to the last will, and remains executor still. (i) The case would be otherwise if we suppose him to have renounced the executorship.

The construction of the above statute has indeed been still further enlarged; for it has been held that where lands are devised to trustees to be sold, and the same persons to whom they are so devised are in another part of the will appointed executors, the said statute is to be extended to such a case. Thus in Bonifaut v. Sir Richard Greenfield, (k) the case was as follows:—A testator seised of the manor of D. devised the same to J. S., and three others, and their heirs, to the intent that the trustees should sell it for the best profit, and apply the money as therein mentioned; and in the conclusion of the will he made the same four persons his executors, and died. One of the four refused to meddle with the will or sale, and the other three sold the land in the lifetime of the fourth; and whether the sale was good, was the question.

The case was argued by Popham and Egerton; and it was adjudged that the sale was good by the three executors, either by the common law, or by the statute 21 Hen. 8. c. 4.; for it was said that when a testator devises the land to four to sell, and afterwards makes them his executors, this was tantamount to devising that such his executors should sell; and that in such a case, at the common law, the sale by three, the fourth refusing, was good; for these three might perform the will without the fourth, but the statute made it clear. (l)

Whether uses limited by will are within the statute.

Powers to be exercised over real estate may also be created in the way of limitation by will; and it should

(i) Co. Litt. 113 a. (k) Cro. El. 80.

(l) It may be proper, however, to observe here, that though such a sale by one or some of the trustees being also executors, the rest refusing, would seem to be good and valid to carry the whole legal estate and interest, yet where the receipts of the trustees are made discharges to the purchaser, there may be doubts whether he would be safe in paying his purchase money without an acknowledgment from them all.

seem through the medium of uses. As, if a testator devise to J. S., and his heirs, to the use of A. for life, remainder to B. in tail, with power to A. to charge the land with a rent, or to lease the same, or to subject it to a jointure, such power seems to be in its true nature an use which is made a legal estate by the statute of Uses. It has been maintained, however, upon the authority of a case reported by Siderfin, (*m*) that powers under wills are not like powers under conveyances operating by way of use; as, where there is a devise to J. S., and his heirs, to the use of A., remainder over, with power to A. to limit a jointure or rent charge, &c., here there is no seisin in T. S., consequently no such use in A. as is executed by the statute of Uses; and that, therefore, the execution of the power is no use, but operates as a devise under the statute of Wills. (*n*)

The statute of 27 Hen. 8. c. 10. was antecedent to the statute of Wills, 32 Hen. 8. and 34 Hen. 8.; and the above opinion is founded on the assumption that a statute cannot be considered as extending to a matter not in existence at the time of making it. Lord Coke, however, in Vernon's case, has combated this position; and contends that "it is frequent in our books that an act made of late time shall be taken within the equity of an act made long time before;" and, in support of this assertion, he has produced several instances. And Chief Justice Holt, in Sir William Moore's case, (*o*) takes it as a point not in dispute that a subsequent statute may be comprehended within the meaning of an act precedent, as the statute of 32 Hen. 8. of Wills within the statute 27 Hen. 8. of Jointures. It is clear, however, that as such uses are either executed by the

(*m*) Hore *v.* Dixon, Sid. 26.

(*n*) This appears to have been at one time the opinion of the late Mr. Booth: but he subsequenty admitted that "it had been resolved that a devise to a use might be as well as a feoffment to an use; and that the uses under such devises would have the same operation as uses under feoffments."

(*o*) Lord Raym. 1028.

statute or effectuated as executory devises, the point is of no practical importance.

Where a power is created, and on default of appointment estates are limited over, the remainders vest subject to the power.

Where estates are subjected to a power of appointment in the first taker, the remainders, if limited so as to vest were the power out of the way, will vest notwithstanding such power, subject to be divested by the execution of the power, if such divesting be necessary to its effect. There are some old opinions (*p*) to the contrary: but the point may now be regarded as settled. In the case of Doe on demise Willis *v.* Martin and Others, (*q*) the limitations were by a deed: but whether by deed or will, the principle would be the same. Thus by a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates and interests as the husband and wife should by deed appoint, and for want of such appointment, to the use of all and every the child or children of the marriage, in such shares and proportions and for such estates, &c. as the survivor of them should by deed or will appoint; and for want of such appointment, then to the use of the child or children, if more than one, share and share alike; and if but one, then to such only child, his or her heirs and assigns, and in default of such issue, remainder over. And the deed contained a power enabling the settlors to revoke the uses of the settlement, and the trustees to sell the estate, and convey it to a purchaser, so as the purchase money should be paid to the trustees, (and not to the settlors) and invested in the purchase of other lands to the same uses. It was held that the remainder to the children was a vested remainder in fee, liable however to be divested by the appointment of the parents; and further, that as no appointment was made, the remainder to the children could not be defeated by a deed of revocation by the

(*p*) 10 Rep. 78. and Walpole *v.* Lord Conway, Barn. C. R. 153.
(*q*) 4 T. R. 39.

parents, and a conveyance by them and the trustees to the purchaser who paid the consideration money to the settlors, (not to the trustees) which was never laid out in the purchase of any other lands, the power of revocation being conditional, and the condition not performed.

So in the case of personal estate where (*r*) a man devised to his daughter J. 3000*l.* for the use of her younger children to be by her distributed among them in such manner, shares, and proportions, as she should think fit; and if no appointment were made by her, then equally to be divided among her younger children. This was construed a present legacy, vested in those then born, though subject to the mother's appointment. The point, though for some time fluctuating, (*s*) may now be considered as resting firm upon authorities too numerous to be again disturbed.

An absolute general power equivalent to the fee simple.

A general power of appointment, by which is meant a power of disposing of the estate in whatsoever manner the donee of the power may think proper, is equivalent to a limitation of the land to him in fee simple: he has an absolute disposing dominion over the property, and may do with it all that an original owner of the fee is competent to do. It follows that when a donee exercises such a power, the estates which he creates in virtue thereof are to be considered as commencing with his act; and are not to be referred to the date of the instrument creating such power, in computing their tendency to a perpetuity. If, therefore, the person invested with such a power executes it by a limitation to A., with remainders to his unborn children, such an execution will not be liable to any objection from its tendency to a perpetuity, although A. was not in being when the power was created; whereas if the commencement of the limitations were to be referred

And dates from the time of the execution.

(*r*) Coleman *v.* Seymour, 1 Ves. 209.

(*s*) Smith *v.* Lord Camelford, 2 Ves. Jun. 698. Goodill *v.* Brigham, 1 Bos. and Pul. 198. Ambl. 364. Madox *v.* Jackson, 2 Bro C. C. 588.

back to the creating instrument, the second limitation would have been unquestionably void for remoteness.

When the power is not general, but exerciseable only in favour of particular objects, there the alienability of the subject is restricted, and the tendency of such a power towards a perpetuity is to be considered on a different principle. By the very creation of such a power the estate has a prescribed and limited course assigned to it, and under such a power no future interest can be created which would have been too remote if contained in the deed which gave birth to the power. Thus if one by settlement limit an estate to A. for life, remainder to and among his children as he shall appoint: if A. appoint to a son born after the settlement for his life, remainder to the children of that son, to take by purchase, such an execution of the power will be void; for if the remainder to the unborn children of A., with remainder to the children of such unborn children, had been limited by the settlement, such ulterior limitation would have been void; and when estates are limited under such a power, they are to be read and construed just as if they had been inserted in the settlement. But it should be remembered that there is a difference with respect to this point between a deed and a will. The one operates from the execution thereof, the other speaks only from the death of the testator; so that if a will creates such power as last mentioned, and the first object of the power, though unborn at the date of the will, comes into being before the death of the testator, the power will be well executed, if it limit the estate to the child so born between the date of the will and the testator's death, with remainder to the unborn children of such child.

Of the relief in equity, where a will exceeds the proper boundary according to the terms of the power; and of the doctrine of *cy près*.

Where a power is executed by will, if the limitations are carried beyond the boundary within which the law has confined them, the courts will in many cases endeavour to put such a construction on them as will bring

(*t*) Gordon v. Levi, 4 Ves. Jun. 636. *ib.* 771. 5 Ves. Jun. 748. 7 Ves. Jun. 783. 10 Ves. Jun. 265. and see Fearne Cont. Rem. 229.

them within the proper limits. They have also gone far in furtherance of the general intent of a testator by applying the doctrine of *cy pres* in their construction of it, coming as nearly up to the views of the testator as the rule of law would allow, by enlarging the first limitation so as to preserve the estate in a channel as near as possible to the course intended. Thus in the case of Pitt *v.* Jackson, (*u*) at the Rolls, where money was directed to be laid out in land, to be settled, after the death of the husband and wife, to the children of the marriage, as the father by deed or will should appoint. The father, by his will directed part of the fund to be laid out in real estate to be conveyed to the use of his daughter, during her life, for her separate use, remainder to all and every the child and children of his daughter as tenants in common; and Lord Kenyon, M. R. determined that in order to effectuate the testator's general intention, which could not strictly be carried into effect according to the terms of the disposition, the daughter must be considered as taking an estate tail. (*w*)

The above was a case wherein the power was exercised in favour of persons not the objects of the power, and the doctrine, in this extent of its application, has been judicially controverted, though perhaps now to be considered as settled. It is only indeed with reference to the effect and construction of wills, that it is suffered

(*u*) 2 Bro. C. C. 51.

(*w*) The authorities are numerous to shew that a power to appoint to children does not reach to grandchildren, Alexander *v.* Alexander, 6 Ves. 642. Butcher *v.* Butcher, 9 Ves. Jun. 382. 1 Ves. and Beames, 79. Robinson *v.* Hardcastle, 2 T. R. 241. by which authorities the cases of Devon *v.* Cavendish, cited 4 T. R. 744. note, has been overruled. Nor does a power to appoint to issue extend to grandchildren, and other more remote issue, Stockley *v.* Mawbrey, 1 Ves. Jun. 150. Though such would be the force of the word descendants, as appears by the case of Butler *v.* Stratton, 3 Bro. C. C. 369. It is plain, also, upon the clearest ground, that a power to appoint to the children of a marriage in contemplation will not extend to the children of a subsequent marriage. Goodtitle *v.* Weal, 2 Wils. 369.

to prevail; and with respect to wills, it has its proper bounds. Where an estate for life has been limited expressly in a will to the unborn child or children of a person unborn, the Courts have refused to enlarge by construction the estate of the first taker into an estate tail for the sake of giving effect to the ulterior void limitation. (x)

The only ground for enlarging the first limitation into an estate tail is, the favour with which it has ever been the disposition of our law in its practice to regard the general intention of a testator appearing by the context and scope of his will: but unless such a construction will clearly operate in furtherance of such general intention, it will not be adopted; which was the principle of the judgment delivered by Lord Rosslyn in the case of Bristow and Warde, (y) where the distinction was stated between a case in which no estate tail was given to the unborn object of the second limitation, nor any intention of that sort expressed; and one in which, as in Pitt v. Jackson, there was a clear *indicium* of an intention that all the issue should take in the course in which an estate tail should go.

Nor does this method of carrying the general *object* into effect by the nearest allowable approach to it, or what is called an execution of it *cy pres*, apply to personal estate; since by assigning to the first limitation a force equivalent to a gift in tail, it would defeat instead of effectuating the intention; for thereby the personalty would become absolutely vested in the first taker, and go to his executor and not to his children after his death. (z)

(x) Seaward v. Wellock, 5 East Rep. 198. 2 Ves. Jun. 365. In which case the testator aimed expressly at creating a succession of life estates: but where the limitation over to the son of an unborn son imported an estate tail by purchase, the estate of the first taker has been construed into an estate tail so as to effectuate the general intent by carrying to the son an estate tail by descent. 3 Burr. 1066.

(y) 2 Ves. Jun. 336.

(z) Routledge v. Dorril, 2 Ves. Jun. 364. and see Knight v. Ellis, 2 Bro. C. C. 570. Kelly v. Fowler, Wilm. 298.

In the case of Probert *v.* Morgan, (*a*) it was laid down by Lord Hardwicke, that if a man has a power to charge an estate, it is not necessary, in the execution of it, that he should refer to the deed out of which the power arises; for in a Court of Equity it is enough that his intent appears; and if in the execution he sufficiently describes the estate which he has a power to charge, the estate is bound, especially where the person charging is a purchaser of the power. But it was the clear doctrine of the case of Moulton *v.* Hutchinson (*b*) that the intent to execute the power must in some way appear. Thus where J. C. devised the produce of 1000*l.* S. S. stock to F. C. for life, and gave him a power to dispose of 400*l.* by any writing signed in the presence of three witnesses, and limited the same over in default of appointment; and F. C. made his will, and after several legacies bequeathed the residue of his personal estate among his nearest relations, such disposition of the residue was held to be no execution of the power.

Not necessary in executing a power to refer to the instrument creating it.

And in another case (*c*) before the same Chancellor his Lordship observed, that though a man may execute a power without reciting or taking the least notice of it, yet it is necessary that he should mention the estate which he disposes of; and he must shew that he takes notice of the thing which he had a power to dispose of.

By putting the above observations together, we come to the conclusion, that it is a proper caution to recite the power about to be exercised, though not absolutely necessary: but that there should be at least a reference either to the power, or to the subject to which the power relates. (*d*)

That a mere devise of the residue in the general terms of such a disposition will not operate as an execution of a power of appointment, either with respect

A mere general devise of the residue not an execution.

(*a*) 1 Atk. 441. 4 Ves. Jun. 159.
(*b*) *Ib.* 558.
(*c*) *Ib.* 559. and see 2 Bro. C. C. 303. 3 Ves Jun. 301.
(*d*) *Ex parte* Caswell, 1 Atk. 559.

to real or personal estate, is a point settled upon the authority of many cases. (*e*)

Where the devise can only have its effect under the power, it will be deemed an execution.

Where the will, however, can have no operation on a particular fund of which it affects to dispose, unless by virtue of a power with which the testator is invested, he having no interest or property in the same fund independently of his power, his disposition will have its effect as an execution of the power, if the formal requisites are complied with. (*f*)

But the bare circumstance of the instrument's being executed according to the power weighs nothing in the decision of this question. (*g*)

Parol evidence not admissible in proof of intention to execute a power.

And it has been often held that parol evidence cannot be received of a testator's intention to execute his power. (*h*) Nor if it turns out that the legacies given cannot be paid without resorting to the fund over which the testator had a power of appointment, will the Court act upon inference from such extrinsic circumstance. (*i*) In the late case of Jones *v.* Tucker, (*k*) at the Rolls, where the testatrix gave all her freehold and copyhold estates, upon trust to permit E. S. to receive the rents, &c. during her life, and after her death to sell, and out of the produce to pay 100*l.* to such person as she should by will appoint; and E. S. by will, without reference to the power, gave 100*l.*, and the whole of her household furniture to the plaintiff; and it was charged by the bill and not denied, that E. S. had no personal property at the time of her death besides

(*e*) Buckland *v.* Barton, 2 H. Bl. 136. Hales *v.* Margeram, 3 Ves. Jun. 299. Langhan *v.* Renny, 3 Ves. Jun. 467. Croft *v.* Slee, 4 Ves. 60. Nannock *v.* Horton, 7 Ves. Jun. 398. Bennet *v.* Aburrow, 8 Ves. Jun. 609.

(*f*) Standen *v.* Standen, 2 Ves. Jun. 589. Surman *v.* Surman, 1 Taunt. 289. Dillon *v.* Cavanagh, 2 Sch. and Lef. 464.; and see the rule laid down in Sir Edward Clere's case, 6 Rep. 17 b.

(*g*) Andrews *v.* Emmot, 2 Bro. C. C. 297.

(*h*) Moulton *v.* Hutchinson, 1 Atk. 558. Standen *v.* Standen, 2 Ves. Jun. 589.

(*i*) Andrews *v.* Emmott, *sup.*

(*k*) 2 Meriv. 533.

some household furniture to a very small value; an inquiry into the state of the property at the date of the will in order to shew that E. S. the testatrix must have intended the gift of 100*l.* to operate as an execution of her power was refused, and the bill dismissed.

Distinction between real and personal property as to the admissibility of evidence to shew from the state of the fund the intention to execute the power.

With respect to the point decided by the last mentioned case, the Reader should be apprised of a distinction very deserving of notice between real and personal estate. On the latter description of property, a will has no specific operation till the death of the testator; so that, although he may have no money to satisfy the bequest at the time of making it, the Court cannot say that he may not expect to be in possession of sufficient to answer such legacy at the time of his death. Where the subject is real estate, it is to be remembered that the devise is specific, and has an inchoate bearing upon the property. The question, therefore, in such a case might be whether at the time of making the will there was any thing to satisfy the disposition without the exercise of the power. His Honour observed, in the above case, that in his own private opinion the intention was to give the 100*l.*, which the testatrix had a power to dispose of: but he did not conceive that he could judicially declare the power to have been exercised, even if the result of an enquiry should verify the representation which was made as to the state of the property.

In a still later case, (*l*) the will, attested by three witnesses, of a person having a power to dispose of a fund consisting partly of real estates, and partly of household furniture, linen, and plate, containing a devise of "all his estates and effects, of whatsoever denomination," and of his "household furniture, linen, and plate," was held not to be an execution of the power. And parol evidence, which was proffered to shew the inade-

(*l*) Jones *v.* Curry, 1 Swanst. 66.

quacy of the personal estate of the testatrix to satisfy the purposes of the will, was rejected.

The same distinction between real and personal property as affecting this question, adverted to in the beforementioned case of Jones and Tucker, was in this case also recognized; his Honour observing that where the subject of the power and of the devise was real property, the Court permitted itself to resort to extrinsic evidence to ascertain the intention of the testator: for which was cited the authority of Standen *v.* Standen already noticed.

Who will be entitled in case of non-appointment, where there is no devise over in default of appointment.

We have seen that where a power over an estate is given, and in default of the exercise thereof the land is devised over, the estate, if limited so as to vest, will take effect accordingly, subject to be divested by the execution of the power. But it frequently happens that the property is subjected to a power without any express disposition thereof in default of appointment. And, in such a case, a question of difficulty may arise as to the title of the objects of the power in case of non-appointment. The question seems to turn upon the point, whether the powers are simply optional or imperative; or, in other words, whether they are mere powers, or powers in the nature of trusts. If a man have a trust reposed in him which is to be performed by the exercise of a power, the power is so implicated in the trust, as to be governed by the same equitable obligation; and if under such circumstances the donee of the power refuse to execute it, the Court will not permit the trust to fail on account of this omission, but will interpose its own authority to carry it into execution. As where a power is given to trustees to sell and apply the produce. Until such a power is executed, the legal estate will of course descend: but wherever the legal estate goes by regular transmission, it will be subject to a jurisdiction, by which it will be made to answer its intended purposes.

The question last above alluded to generally arises

where children are the objects of the power. In which case it is often the duty of the party empowered to exercise the power; and the Court will not permit the objects of the provision, to be defeated by any mischance, still less by the neglect of the person who may be called the trustee of the power. In the case of Harding *v.* Glyn, (*m*) which is an early authority on this point, Harding devised certain effects to his wife, but "desired her at or before her death to give the same to and amongst such of his own relations as she should think most deserving, and approve of." And this was held to be a trust for the relations in default of appointment, by the Master of the Rolls, who was of opinion that it operated as a trust in the wife, by way of power, to name and apportion; and that her non-performance of the power should not make the devise void, but that the power should devolve on the Court. And in a case (*n*) decided long after, where a leasehold estate was devised to A., with power "to employ the residue after paying certain sums to such children of his nephew S. B., as he the said A. should think most deserving, and that would make the best use of it," this was treated as a trust for all the children, in default of appointment. And the decree was affirmed on a rehearing at the Rolls; and afterwards by Lord Chancellor Eldon, on an appeal. (*o*)

(*m*) 1 Atk. 469. And see 5 Ves. Jun. 501., and 8 Ves. Jun. 571.

(*n*) Brown *v.* Higgs, 4 Ves. Jun. 708.

(*o*) 4 Ves. Jun. 708. 5 Ves. Jun. 499. 8 Ves. Jun. 561., and see 4 Ves. Jun. 792., and Cruwys *v.* Coleman, 9 Ves. Jun. 319. See also the Duke of Marlborough *v.* Godolphin, 2 Ves. 61. and S. C. stated from Reg. Lib. 5 Ves. Jun. 506. wherein a distinction appears to have been adopted by Lord Hardwicke, between a case where a testator bequeathed "to and among his children as A. shall appoint," and where he bequeathed it "to and among *such* of his children as A. shall appoint;" the latter of which forms of bequeathing his Lordship seemed to think implied only a mere power, and carried nothing in default of its being executed.

But the words of the power have been sometimes held to carry the estate in default of appointment by direct devise without the mediation of any trust. Thus in a case in MS., decided in Trinity term 1734, it was held by Lord C. Talbot, that a bequest to A. for his life, coupled with a desire, that at his death he would give it among his children, and the children of his daughter, as he should think fit, amounted to a devise to the children in default of appointment; whose right to the fund was established by the decree. And the same principle of construction, though it turns upon a distinction of some refinement, has been adopted in other cases. (*p*)

Where in default of appointment the fund is given absolutely among the objects of the power, and there happens ultimately to be only one person to receive the benefit, the interest will belong wholly to such person; who will take independently of the power, should it be exercised in curtailment of that interest. In a case upon a marriage settlement, the estate was limited to the use of such child or children of the marriage, and for such estate and estates, and subject to such powers, conditions, provisos, and limitations, as the wife should appoint; and, in default of appointment, to the use of the children in fee; and, in default of issue, then as the wife should appoint generally. There was only one child, a son, to whom the wife, in virtue of her power, devised the estate in fee; and, in case he should die under twenty-one, and without issue, then over. It was adjudged that the child took an estate in fee under the settlement; and it was said that the wife could not alter the estate of the son. (*q*) Which accords with the doctrine of Bellasis *v.* Uthwaite, (*r*) where, under similar circumstances, the child was held to take under

(*p*) See Longmore *v.* Broom, 7 Ves. Jun. 124.
(*q*) Doe *v.* Denny, Say. 295. Roe *v.* Dunt, 2 Wils. 336.
(*r*) 1 Atk. 427.

the limitation, and not by virtue of the power, as being the better title.

In both the above cases of Doe *v.* Denny, and Roe *v.* Dunt, it is to be observed, that the power authorised an appointment to the child or children of the marriage for such *estate and estates* as the donee of the power should limit; and it is not easy to see why with such a controul over the quantity of the estate the power might not be well exercised, though only one object of it existed. Where the power merely applies to the apportionment of the shares among the objects, such power is not exerciseable where there is only a single object. Thus in the late case of Campbell *v.* Sandys, (*t*) where by marriage articles some estates were agreed to be conveyed to trustees to the use of the children of the marriage, in such shares and proportions as the husband should appoint, and for want of appointment, to go to the children equally. There being only one child, Lord Redesdale held that as the power was only to limit the proportions in case of there being more children than one, the power never arose at all; and the case was to be considered as if no power had been inserted in the settlement. But where the authority is to limit such *estate or estates* to and amongst such child or children, &c. it seems that a different construction might prevail notwithstanding the cases of Doe *v.* Denny, and Roe *v.* Dunt, above cited; since the authority in those cases was attempted to be exercised by giving to the sole object of the power not an estate of less quantity than a fee simple, but a defeasible estate limited over on a contingency.

Where there is no limitation in default of appointment, the power is exerciseable, though there should be but one object of it in existence, as it is only in virtue of the power that such object can take at all. And where the power is to appoint the whole to and

(*t*) 1 Rep. temp. Lord Redesdale.

amongst such child or children, &c. and in default of appointment, the estate is given only among the children in shares, the entirety may be given under such power to a sole existing object. (*u*)

If, indeed, the power itself is limited to be exercised by the appointment of an estate among several objects, and the estate in default of appointment is given to them as tenants in common, the death of any of the objects in the lifetime of the testator will *pro tanto* defeat both the power and the devise over, which will only remain as to the shares of the survivors,(*x*) though the case would be otherwise under a devise to several as joint tenants, where the death of one or more of them would not occasion a lapse, as in the former case.

The words by which a power is executed, receive their construction according to the nature of the instrument.

That, with respect to the execution of powers by wills, the law is more indulgent than when the execution is by an act *inter vivos*, we have already seen in considering the doctrine of *cy pres*. The same principle of favour is extended to the construction of the language of the limitations. If the appointment under a power is of an estate to A. by a *deed*, containing no words (*y*) of limitation, an estate for life only will pass to the appointee. Again, if in a *deed* a power is executed by the limitation of an estate to A. for life, remainder to his issue male, the first estate will be for the life of the parent, and his children will take as jointenants by purchase for their lives. And so in every case a *deed* executing a power is construed with the same strictness as a regular conveyance by feoffment at common law. (*z*) But a will executing a power is construed with the same latitude as a proper will.

(*u*) Boyle *v.* Bishop of Peterborough, 1 Ves. Jun. 299.

(*x*) Reade *v.* Reade, 5 Ves. Jun. 744. Casterton *v.* Sutherland, 9 Ves. Jun. 445.

(*y*) Co. Litt. 42 *a.*

(*z*) See Makepeace *v.* Fletcher, 2 Com. 457. Tapner *v.* Merlott, Willes 177. Doe *v.* Morgan, 3 T. R. 765. Stratton *v.* Best, 1 Bro. C. C. 333.

Thus in the case of the Duke of Marlborough *v.* Lord Godolphin, (*a*) it was said by Lord Hardwicke, that "if a power is given by deed to appoint lands by will, and the person to whom the power is given makes a will, and gives the land to A. and his issue, the law says that though such appointee takes under the power, yet the execution of the power being by will, it shall receive the same construction as if it were a direct devise of lands, *viz.* the limitation shall be construed to give an estate tail. So if it had been to A. for ever, that would have been an estate in fee. It was never doubted but that the construction of the words would be the same exactly as if he took strictly and properly under the words of a will."

Execution of powers with a deviation from the terms of their creation supported in equity, under what circumstances.

The relief afforded by the courts of equity to executions of powers departing from the terms of their creation is extended liberally to wills. And even where the defect in the mode of execution consists in making the appointment by a *will,* where by the terms of the power it ought to be executed by a *deed,* equity will consider the power as substantially complied with.—Thus where a power was given to the husband and wife, or the survivor, by any deed or deeds duly executed to charge upon the lands any sums not exceeding 3,000*l.*; and the husband, who survived, by his will declared that the 3,000*l.* charged upon his estate should be disposed of for his younger children's fortunes; the Lord Chancellor declared that the power was defectively executed by the testator's will; but that such defect ought to be made good in a court of equity, and that the 3,000*l.* was well charged by the testator's will for the benefit of the said younger children. (*b*) And although where the power is directed to be ex-

(*a*) 2 Ves. 61., and see Southby *v.* Stonehouse, 2 Ves. 610., and Robinson *v.* Hardcastle, 2 Bro. C. C. 30.

(*b*) Sneyd *v.* Trevor, Reg. Lib. B. 1747. fo. 442. Tollet *v.* Tollet, 2 P. Wms. 489.

ecuted by will generally, and the subject is real property, such will, according to most writers, ought in strictness to be executed by a proper will, with the solemnities required by the statute of Frauds; yet it is well settled that equity will relieve against the defect of such execution. This point was determined by Lord Hardwicke in the case of Wilkes *v.* Holmes, (*e*) where his Lordship held that the defect of the due execution according to the statute might be supplied; observing that where a will is to operate by way of appointment, it takes no effect from the statute, and that the appointee does not claim under the will, but by the deed directing the execution of the power.

In the view of a court of equity, the great point is, that every power should be substantially executed, not only as to the interest intended to pass under it, but as to the particular checks and formalities by which the execution was expressly directed to be accompanied. If, therefore, the power is directed to be executed by a will, the estate cannot under such a power be sold and conveyed to a purchaser. Nor can a power directed to be executed by a will be executed by a deed; for where the donor of the power expressly prescribes the execution to be by will, he must be understood to intend that the power should remain capable of execution to the moment of the donee's decease; and such capability would be destroyed were the power to be executed by a deed. (*f*)

A power to be executed by a deed, cannot be executed by will.

(*e*) 9 Mod. 485. And see 1 Sch. and Lef. 60.
(*f*) Reid *v.* Shergold, 10 Ves. Jun. 370.

SECT. IV.

Election.

THE subject of election has been discussed in a former part of this Treatise, where the execution of wills was under consideration, in reference only to the question whether an unexecuted will is of force to give birth to a case of election against the heir taking a benefit under the same will.

A few further observations seem proper to be added in this place upon the general doctrine, as a branch of the "Efficacy of Wills," the subject with which we are at present engaged.

The principle of the rule.

The doctrine is simply this, that no one shall enjoy any benefit under a will without conforming and giving effect, as far as he is able, to every disposition contained in it; if not *in toto*, at least to the extent of indemnity or compensation, if the disposing intention be clear, and the subject of the disposition certain. (*g*)

It has been holden that where a testator is under an impression that he has lawful authority to dispose of an estate or interest, and such impression is manifest on the face of the will, as it could not be known what he would have done had he been aware that he had no power to make the disposition, a case of election would not arise: (*h*) but the danger of speculating upon what the testator would have done had he known his want of power has been since considered as a ground for overruling such a construction; and the intention is now the only point to be considered, without regard to the fact of knowledge or no knowledge by the testator of his real authority or legal predicament. (*i*)

(*g*) Molyneux *v.* Scott, 1 Bl. 377. Whistler *v.* Webster, 2 Ves. Jun. 367.

(*h*) Cull *v.* Showell, Ambl. 727.

(*i*) Whistler *v.* Webster, 2 Ves. Jun. 367. Rutter *v.* Maclean, 4 Ves. Jun. 531. And see Doe *v.* Lord George Cavendish, 4 T. R. 741. n.

From Whistler *v.* Webster before cited, where these points are well elucidated, it appears that where one has a power to appoint to A., and the fund in default of appointment is given to B., and the donee of the power exercises it in favour of C., and gives other benefits to B., although the execution is void, yet if B. accepts the benefits so bequeathed to him, he can take no advantage of the void execution, but on the contrary must give effect to it by conveying the estate according to the appointment. (*j*) And so if a man have a power to appoint to two, and he appoints to one only, and gives a legacy to the other, a case of election arises. (*k*)

The late case of Thellusson *v.* Woodford gave occasion to much clear elucidation of this doctrine. (*l*)

Peter Thellusson, by his will, dated April 2, 1796, amongst a variety of dispositions, devised as follows:—

"In case I shall in my lifetime enter into any contracts for the purchase of any lands, tenements, or hereditaments, and I shall happen to die before the necessary conveyances thereof are executed, I order and direct, that all and every such contract or contracts, so entered into by me as aforesaid, shall be completed and carried into execution by my said trustees after my death, and that the purchase monies for such respective estates and premises shall be paid by them, by, with, and out of my personal estate and effects, and that the deeds and conveyances thereto respectively shall be made to them, their heirs and assigns; and that they and every of them shall stand, remain, and be seised and possessed of all and singular the premises so to be conveyed upon, under, and subject to such and the same uses, trusts, limitations, provisoes, and conditions, as are in and by this my will created, expressed and declared, of and concerning the estates hereby directed to be purchased by and with the aforesaid *residuum* of

(*j*) 2 Ves. Jun. 367.
(*k*) Wollen *v.* Tanner, 5 Ves. Jun. 218.
(*l*) 13 Ves. Jun. 209.

my estate and effects in the manner hereinbefore mentioned."

"The testator, within a month before his death, had contracted for the purchase of real estates to the amount of 30,000*l.*

"The bill filed by the trustees prayed, that the trusts of the will might be established; and that it might be declared, whether Peter Isaac Thellusson, as heir at law of the testator, was or was not entitled to such parts or particulars of his real estate, as were conveyed to him after making his will; and also to such particulars of his real estates as were purchased, contracted, or agreed to be purchased by the testator, after making his will; and to have such of the said contracts as remained unperformed at his decease completed for the benefit of his said heir at law, and to have the purchase money paid out of the personal estate of the testator; and particularly, that it might be declared, whether the heir was entitled to such last mentioned real estates, and also to the legacies and bequests in the will: and, if not, then that he might be put to his election.

"The decree, dismissed the bill filed by the widow and children of the testator, as far as it sought to have the trusts of the will declared void, and established the will. It also gave directions for carrying the trusts into execution, and declaring a trust, as to the estates, contracted for by the testator, after the date of his will, for the heir, reserving the question, whether he would be entitled to the personal bequests; and the same having been affirmed by the House of Lords upon appeal, the question of election was brought forward upon the petition of the trustees.

"Lord Chancellor Erskine, after stating that 'The prayer of the bill, filed by the heir at law, with reference to this point, was in effect, that the personal estate of the testator should be applied to the completion of the contracts directed by the will to be carried into execution, for the benefit of the heir; and that he, in opposition to the will, might take as heir those estates so

contracted for;' and that the trustees might stand seised to his use, instead of the uses of the will, proceeded thus: 'I give the judgment,' said his Lordship, 'which I find myself bound to give, with some reluctance; considering this will as dictated by feelings not altogether consistent with convenience. But this appears to me to be a case of election. The jurisdiction exercised by this Court, compelling election, may be thus described. A person shall not claim an interest under an instrument without giving full effect to that instrument, as far as he can. If therefore a testator, intending to dispose of his property, and making all his arrangements under the impression, that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition, where it is in his power, and yet take under the will. The reason is the implied condition, that he shall not take both; and the consequence follows, that there must be an election; for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property unless in the manner intended by the testator:—

"In every case of election there must be an intention to dispose of that, over which that person has no power of disposition. That is the circumstance which creates election. The testator, with this peculiar object, the application of his personal estate to the acquisition of great landed property, was not aware of the distinction between real and personal estate; and therefore conceived, that under this direction of his will as to his future contracts for purchases, his trustees would be legally seised according to the uses of his will. As he had not the power to make that disposition, the heir takes those estates that cannot pass by the will: but the testator not being aware of that, gives considerable interests to his heir; but gives those interests

under the conception that the whole property and arrangement were subject to his controul; and upon that ground the principle of election must prevail.

"The principle of election is plain and intelligible; that, if a person being about to dispose of his own property, includes in his disposition, either from mistake or not, property of another, an implication arises, that the benefit under that will shall be taken upon the terms of giving effect to the whole disposition. Mr. Thellusson's heir takes these estates, as if the father had not made a will: but my opinion is, that he cannot also take what is given to him by the will. He must therefore elect."

As the doctrine of election involves a principle of compensation, it cannot have place where there is no other fund besides that over which the power is exercised, or attempted to be exercised. If, therefore, under a power to appoint to children, a father makes an appointment not warranted by his power, a child may claim against it, though the appointment gives him a specific benefit. There must be some free disposable property given in substitution for what is taken away.(*m*)

And on this principle of substitution or satisfaction a tacit condition accompanies every benefit bestowed by a testator, that the party benefited shall not contravene the intention manifested in any other part of his will. The intention of the testator may be said to diffuse itself over the whole will: to profit by such intention therefore in one part, and defeat it in another, would be an injustice to the donor, and in such view an unconscientious proceeding which a court of conscience will not permit; and in this way effect is given to a disposition of that which is not the property of him that gives it.

But the mere recital of an erroneous conception of right is no devise by implication so as to raise a case of election as against the person having the right, and also taking a benefit by the will: the testator must,

(*m*) Bristow *v.* Warde, 2 Ves. Jun. 336.

by a positive attempt to dispose, make his intention clear. (*n*)

To raise a case of election, the intention may therefore be considered as the great and indispensable ingredient. Even a devise to the heir though inoperative, since the estate would be his by descent, as by his better title, would nevertheless be sufficient to put him to his election between the property so devised to him and his claims adverse to the will. (*o*)

Thus in Welby *v.* Welby, (*p*) where the testator devised certain lands of which he was seised in fee simple to his eldest son and heir at law; and devised certain other estates whereof he was seised for life, and to which his eldest son was entitled as tenant in tail, to his grandson, it was said by the Master of the Rolls, Sir William Grant, in giving his judgment, that, independently of Lord Cowper's decision in the case in *Gilbert*, he should have thought it perfectly clear, that an heir, to whom an estate is devised in fee, may be put to an election, although by the rule of law a devise in fee to an heir is inoperative. For if the will is so framed as to raise a case of election, then not only is the estate given to the heir under an implied condition that he shall confirm the whole of the will: but, in contemplation of equity, the testator meant, in case the condition should not be complied with, to give the disappointed devisees out of the estate over which he had a power a benefit correspondent to that of which they are deprived by such non-compliance. So that the devise is read as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as for so

(*n*) Dashwood *v.* Peyton, 18 Ves. Jun. 27. and see Forrester *v.* Cotton, Ambl. 388. Read *v.* Crop, 1 Bro. C. C. 492. Blake *v.* Bunbury, 4 Bro. C. C. 21. Judd *v.* Pratt, 13 Ves. Jun. 168. 15 Ves. Jun. 390.

(*o*) Anon. Gilb. Rep. in Eq. 15. by Lord C. Cowper, Noyes *v.* Mordaunt, 2 Vern. 681.

(*p*) 2 Ves. and Beam. 187.

much of the estate given to him as shall be equal in value to the estates intended for them.

The intention to raise a case of election must be gathered from the will itself, not from extrinsic evidence.

But the intention of the testator, on which the obligation of the devisee to elect is grounded, must be clear and decided, and not conjectured, and it must be gathered from the instrument itself, and not from evidence *dehors* the instrument. (*q*)

It has indeed been held, that to shew what the testator meant to comprehend under the general devising words, facts might be given in evidence that it might appear that he meant to deal with the property of other persons as his own, (*r*) though this has been denied in other cases. (*s*)

Where widow must elect between dower, and her husband's will.

The first cases on the subject of election occurred on the question of a widow's title to insist on her dower where a benefit was given her by the will of her husband, by way of recompence and substitution for her dower, though at law no bar of her dower.

One of the earliest of which cases was that of Lawrence *v.* Lawrence in which many benefits were left by William Lawrence, the husband, to his wife during her widowhood, both in land and money, notwithstanding which the widow recovered judgment in a writ of dower. But it was admitted by Powell, J., that if in this case any intent of the devisor had appeared in the devise, it would on the devise being pleaded at large have been a bar to the claim of dower. (*t*)

Lord Chancellor Somers, on a bill filed by the defendant, was of opinion that in equity an averment of the testator's intent ought to be admitted, and that the

(*q*) Forrester *v.* Cotton, Ambl. 388. Judd *v.* Pratt, 13 Ves. Jun. 168. 15 Ves. Jun. 390. Dashwood *v.* Peyton, 18 Ves. Jun. 27. Stratton *v.* Best, 1 Ves. Jun. 285. Blake *v.* Bunbury, 4 Bro. C. C. 21. 1 Ves. Jun. 514. and see Read *v.* Crop, 1 Bro. C. C. 492.

(*r*) Finch *v.* Finch, 4 Bro. C. C. 38. 1 Ves. Jun. 534. Rutter *v.* Maclean, 4 Ves. Jun. 531. Pole *v.* Lord Somers, 6 Ves. 309. Druce *v.* Dennison, 6 Ves. 385.

(*s*) Doe dem. Oxenden *v.* Chichester, 4 Dowe. 56.

(*t*) Lawrence *v.* Dodwell, 1 Lord Raym. 438.

wife, in such case, should not have both her dower, and the land devised; and decreed accordingly; which decree was afterwards reversed by Lord Keeper Wright in 1702. (*u*) On the case coming on before Lord Cowper, on a bill filed by a subsequent remainder-man his Lordship would not on so doubtful a point vary the last determination. And the House of Lords, in 1717, affirmed Lord Cowper's decree.

From the report in Lord Raymond we collect, that a general devise by a husband to his wife cannot at law be averred to have been intended in lieu of dower; (*x*) but that a devise shall go in lieu of dower, if it appears upon the will plainly to have been the intention of the husband that it should, though it be not in terms declared to be by way of jointure. (*y*)

The rule has since been made to bear upon a great variety of cases; and authorises the position, that where a testator deals with the property of another as his own, and gives a bounty to the person to whose prejudice he has so acted, the person prejudiced shall not insist upon his right, which the will takes from him, and at the same time upon the bounty which the will gives him. This application of the rule was the point of the case of *Morris v. Burroughs*, (*z*) in which a freeman of London took upon himself to dispose by will of some orphan shares to his children, to all of whom he gave legacies, and to some the residue of his real and personal estate, and part of them electing to take by the custom against the will, and others electing to take under the will, it was decreed by Lord Hardwicke that the orphanage shares of the latter should pass according to the father's disposition of them.

(*u*) 2 Vern. 366. 3 Bro. P. C. Ed. Tomlins 484.

(*x*) Ruled accordingly 4 Rep. 4. a. and see Co. Litt. 36 b. 9 Mod. 152. Ayres *v.* Willis, 1 Ves. 230. French *v.* Davies, 2 Ves. Jun. 578. Greatorex *v.* Cary, 6 Ves. Jun. 615.

(*y*) See Cro. Cl. 128. pl. 3. Bayntum *v.* Bayntum, 1 Bro. C. C. 444. Pearson *v.* Pearson, 1 Bro. C. C. 291.

(*z*) 2 Atk. 627.

Where a particular benefit is given in satisfaction of a particular claim, the application of the principle of election is bound by the specific terms, and by election to take under the will, only such particular claim is renounced. (*a*) Unless, indeed, the insisting on any other such claims should not consist with the scope and intention of the testator. (*b*)

Devise of a copyhold which had not been surrendered to the use of the will (when such surrenders were necessary) (*c*) compelled the heir, taking benefits under the will, to elect, either to insist on his right, and renounce the will, or to give up his right in compliance with the will. (*d*)

The doctrine does not depend upon the description, amount, or value, of the subject; but upon inconsistency with the intention of the testator as appearing by his will. And accordingly, whether the interests in question be remote or immediate, collateral or direct, absolute or contingent, the principle of the rule is equally applicable. (*e*)

The election by one person cannot prejudice the rights of another.

But a person taking under a will may also take an interest derived under a legal estate claimed by another against the will. Thus, if a wife elects to take an estate of inheritance in opposition to a will, the husband, although he accepts benefits under the will, may yet be tenant by the curtesy of such estate. (*f*) Nor can the heir, a married woman, by her election to take a legacy to her separate use under a will, prejudice the marital rights of the husband as to the subject of a void disposition of the real property. (*g*)

(*a*) See Huggins *v.* Alexander, 2 Ves. 31.

(*b*) Graves *v.* Boyle, 1 Atk. 509. and see Jenkins *v.* Jenkins, Bell's Supplement 250.

(*c*) See Statute 55 Geo. 3. c. 192.

(*d*) Goodwyn *v.* Goodwyn, 1 Ves. 226. Frank *v.* Standish, 1 Bro. C. C. 588. 15 Ves. 391 n. Pettiward *v.* Prescott, 7 Ves. 541.

(*e*) 2 Ves. Jun. 697. 3 Ves. Jun. 6.

(*f*) Lady Cavan *v.* Pulteney, 2 Ves. Jun. 544. 3 Ves. Jun. 384.

(*g*) Brodie *v.* Barry, 2 Ves. and B. 127.

Where benefits are devised to a parent and his children, the claim of the parent in opposition to the will, will not bind the children, who may still elect for themselves. (*g*)

Widow's protection in equity.

Time must also be allowed the widow for ascertaining the comparative value of the things between which she has to choose. (*h*) And she may file a bill to have the debts and legacies paid, and the funds ascertained. Nor will an election made under a mistake be binding on her in equity. (*i*) A bequest in bar of her dower and thirds will not affect her claim as next of kin. (*k*) And to create as against her a proper case of election, there must be either an express declaration, or a necessary inference arising from the inconsistency of her election with the dispositions of the will. (*l*)

Creditor not put to election by devise for payment of debts.

A creditor taking under a devise for payment of debts takes nothing from the mere bounty of the testator in the way of compensation: he may therefore insist upon his legal claim to any other property disposed of by the will. (*m*) So likewise if a creditor be heir, he may oppose the will as to part of the lands devised for the payment of debts, and come in upon another part of the fund raised by the will for the same purpose. (*n*)

Where a certain thing is given expressly in satisfaction of a particular demand, if the party insists upon the demand, it has been held that he must wave the benefit so bequeathed in satisfaction, and also all benefit under the whole will. Thus where S. G. having, upon his daughter's marriage, given a bond to leave 5000*l.* at his death among her younger children, by will creates

(*g*) Ward *v.* Baugh, 4 Ves. Jun. 623. 5 Ves. Jun. 445.

(*h*) Chalmers *v.* Storil, 2 Ves. and. B. 223. Boynton *v.* Boynton, 2 Bro. C. C. 445. Welby *v.* Welby, 2 Ves. and B. 191.

(*i*) Kidney *v.* Coussmaker, 12 Ves. Jun. 153.

(*k*) Pickering *v.* Lord Stamford, 3 Ves. Jnn. 337. *ib.* 493.

(*l*) Villareal *v.* Lord Galway, Ambl. 682. French *v.* Davies, 2 Ves. Jun. 579. Birmingham *v.* Kirwan, 2 Sch. and Lef. 452. and see Ayres *v.* Willis, 1 Ves. 231.

(*m*) Kidney *v.* Coussmaker, 12 Ves. Jun. 136

(*n*) Deg *v.* Deg, 2 P. Wms. 418.

a term for years in trust to apply the rents and profits for maintenance of his daughter's children till twenty-one, and also gives his personal estate in trust to pay the produce of it to his wife for life, and after her death to pay 1500*l.* to A. for one of the daughters of his daughter, and 3500*l.* among the other younger children of his daughter, as she should appoint, and if no appointment, equally between them at twenty-one or marriage, and declared that the legacies should be in full satisfaction of the bond. The plaintiff brought the bill to have her share under the trust of the term, and likewise her share of the 5000*l.* under the bond. But Lord Hardwicke compelled her to choose, to claim under the will or under the bond; declaring that if she claimed under the bond, she must take no benefit at all under the will.

Issue in tail may be put to their election.

The issue in tail may be put to their election by a devise of the entailed property, if they are otherwise benefited under the will; (*p*) and children, to whom property disposable by the testator is devised by a will interfering with their rights under a settlement, must elect between these inconsistent claims. (*q*)

No election in favour of a residuary legatee.

In favour of a residuary legatee a party claiming under a will, and against it, will not be put to his election, for such legatee of the residue is entitled only after all claims are satisfied. So that if a particular demand of any person taking a benefit under a will subjects the personal estate to a debt, no case of election is raised against such claimant, for a claim to the residue supposes the previous satisfaction of debts. (*r*)

Although part of the benefit fails, a case of election may be imposed by what remains good.

Although some part of the benefit intended by the will fails of its effect, a case of election may be imposed by what remains good; as, where real and personal property were both given to the testator's widow, in bar of her claim under her settlement, and the devise of

(*p*) Streatfield *v.* Streatfield, Ca. temp. Talb. 176.
(*q*) Whistler *v.* Webster, 2 Ves. Jun. 267.
(*r*) 3 Ves. Jun. 385. and see 2 Ves. Jun. 561.

the land was void, yet she was put to her election between her claims under the settlement (s) and the bequests.

Of the principle of equitable compensation, in cases of election under wills.

The general terms in which the rule has been expressed appear to imply that a person, insisting on his right as against the testator's disposition of it, must be considered as abdicating *in toto* all benefit under the will. It was thus propounded by Lord Erskine in Thellusson *v.* Woodford, and in a variety of cases. But where the circumstances of the case have distinctly raised the question as to the extent of the retribution to be made by the devisee to those whom he disappoints by insisting upon his title in opposition to the *will*, the rule has been narrowed to the more equitable principle of compensation to the person so disappointed out of the fund devised to the party refusing compliance. Where the benefit devised to the noncomplying claimant has not been more than sufficient to compensate the disappointed party, the proposition would apply in all its breadth, as total forfeiture would not be more than compensation: but where there is a surplus, a different consideration arises. And though in Green *v.* Green, (t) Lord Eldon appears to have held, that where a person elects under a settlement to take one of two inconsistent benefits, he is bound to give up the other absolutely, as being under a contract; for if he will not give the price intended, he shall not have the thing contracted for: yet his Lordship observed, that the question as to election was different, where it arises under a will; and that there were a number of cases deciding that where an express or implied condition arises upon a will, the party taking is not bound to give up more than is enough to make satisfaction for that which was intended for another;—a distinction adverted to by C. J. De Grey, in Lord Darlington *v.* Pulteney, (u)

(s) Newman *v.* Newman, 1 Bro. C. C. 186.
(t) 2 Meriv. 86.
(u) See 2 Ves. Jun. 560.

where he says that an express condition must be performed as framed; and if it is not, a forfeiture is induced. But the equity of this Court is to sequester the devised interest *quousque*, till satisfaction is made to the disappointed devisee.

The authorities for this doctrine of compensation, according to which the surplus value, after satisfaction made to the disappointed devisee, devolves in the course directed by the will, are Webster *v.* Mitford, (*v*) by which it was determined that the fund forfeited, even where the condition was expressed, by election to take against the will, should be sequestered only to compensate those who were disappointed by such election; Streatfield *v.* Streatfield, (*x*) where the surplus value, after compensation to the disappointed devisees, devolved to the infant heir, in his character of devisee; Ardesoife *v.* Bennet, (*y*) where a portion of the legacy bequeathed to the heir was appropriated to indemnify the disappointed devisee, and his administrator was declared entitled to the residue; and lastly, Welby *v.* Welby, (*z*) in which Sir William Grant very explicitly propounded the doctrine; declaring that the devise in that case must be read, as if it were to the heir absolutely, if he confirmed the will; if not, then in trust for the disappointed devisees, as to so much of the estate given to him as should be equal in value to the estates intended for them.

Thus the principle of compensation in these cases of election, where the obligation arises upon a will, may be regarded as sufficiently established; so that where the intention of the testator is defeated by the specific subject of his bounty being withdrawn by a superior claim, he that insists upon such claim can take nothing under the will, if what is thereby given him is below the

(*v*) 2 Eq. Ca. Abr. 363. (*x*) Ca. temp. Talb. 176.

(*y*) 2 Dick. 463.

(*z*) 2 Ves. and B. 190. And see Freke *v.* Lord Barrington, 3 Bro. C. C. 284. Whistler *v.* Webster, 2 Ves. Jun. 372. Ward *v.* Baugh, 4 Ves. Jun. 627. Blake *v.* Bunbury, 1 Ves. Jun. 521. Ker *v.* Wanchope, 1 Bligh 1.

value of the property so claimed by him in opposition to the will. And if the estate or thing devised or bequeathed to such opposing claimant is above the value of what he claims against the will, the Court allows him to take only the surplus of what is given to him by the will after compensation is made thereout to those whom he has disappointed by his claim; or restrains him in the enjoyment of what is so given to him, till the condition under which the Court considers the same as given to him is satisfied.

SECT. V.

Estates pur auter Vie.

29 Car. 2. c. 3. s. 12.

THE 12th section of the statute of Frauds enacts as follows:—"And for the amendment of the law in the particulars following, be it enacted, that from henceforth any estate *pur auter vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee simple. And in case there be no *special occupant* thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands." (*l*)

As the quality of these estates may be much affected by the terms in which they are granted, being some-

(*l*) These estates *pur auter vie* could not be devised within the statutes 32 Hen. 8. c. 1., and 34 & 35 Hen. 8. c. 5. which last statute explains estates of inheritance to mean estates of fee simple only.

times limited to go to the heirs, and sometimes to the executors, administrators, and assigns, which may vary the result as to the operation of testamentary dispositions, it may be useful to take rather a large view of their nature, and the consequences of the several enactments regarding them.

General and special occupancy.

By the common law, where a man was tenant for the life of another, by virtue of a grant to himself only, without mentioning his heirs, and died during the life of him for whose life the estate was holden, in such a case the first occupant, or he who could first get possession of the land, was authorised to keep such possession as long as the *cestui que vie* lived; and this was called general or common occupancy. But this title of general occupancy has given place to the regulations of the statute 29 Car. 2. c. 3. and the subsequent statute 14 Geo. 2. c. 20. By the 9th section of the statute last mentioned, which recites that by the former statute it had been enacted that estates *pur auter vie,* whereof no devise should be made, should, in case there should be no special occupant thereof, go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and should be assets in their hands; and that doubts had arisen, where no devise had been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners were fully satisfied, should belong; it is provided, "that such estates, *pur auter vie,* in case there should be no *special occupant* thereof, of which no devise should have been made according to the said act for prevention of frauds and perjuries, or so much thereof as should not have been so devised, should go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate."

14 G. 3. c. 20. s. 9.

Wherever the limitation in these grants *pur auter vie* is to the grantee and his heirs, the heir at common law is the person to take upon the death of the tenant in the lifetime of the *cestui que vie;* and in such a case

there never was any room for general occupancy, if there was any heir to take. But in what *character* or *capacity* he takes has been a question on which very great lawyers have held different opinions. Lord C. J. Vaughan, in the case of Holden *v.* Smallbrook, (*m*) held, that if a man demised land to another, and his heirs *habendum pur auter vie,* or granted a rent in the same manner, though the heir should have the land or rent after the grantee's death, yet he had it not as a *special occupant* (as the common expression was;) for if so, such heir would be an *occupant,* which he could not be, but he had it as *heir,* not of a *fee,* but of a *descendible freehold;* and not by way of limitation as a purchase to the heir, but by descent; though some opinions are, that the heir took it by special limitation. But the Chief Justice added, that he did not see how, when land or rent was granted to a man and his heirs *pur auter vie,* the heir could take by special limitation after the grantee's death, *when the whole estate was so in the first grantee that he might transfer it to whom he pleased,* so as to deprive him who was intended to take by *special limitation* after the grantee's death.

Lord C. J. Vaughan's opinion that this estate comes to the heir by a proper descent.

This reasoning is certainly strong: but other Judges, though they have adopted the phrase of Lord Vaughan, of descendible freehold, have adhered to the notion of occupancy in the heir, and have denied the inheritable nature of this kind of estate. In Low *v.* Burron, (*n*) Lord Chancellor Talbot held clearly that an estate to one and his heirs *pur auter vie* may be limited to A. in tail, remainder to B.; and that in such cases of limitations to the heirs of the body of the first taker, the words *heirs* of the body were only a description of the persons to take as *special occupants* during the life of *cestui que vie.* These estates are not estates tail; for all estates tail are estates of inheritance to which dower is incident, and which must be within the statute *De Donis;*

Grounds of the contrary opinion.

(*m*) Vaughan 187. (*n*) 3 P. Wms. 362.

whereas in this kind of estate, which is no inheritance, there can be no dower, neither is it within the statute. Furthermore an estate tail is not liable to forfeiture, nor punishable for waste, the contrary whereof is true of the estate in question. And it is plain there can be no occupant of an estate tail, because none can have the estate but the issues of the donee, who *must* take by *descent*. Such too is the comparative imbecillity of the estate *pur auter vie*, that, if a freehold lease for lives be limited to A. and the heirs of his body, with remainder over, A. may dispose of the whole by any conveyance in his lifetime, and it has been said even by his will alone. (*o*)

Again, by the same Chancellor it was held, in Chaplin *v.* Chaplin, (*p*) that where a lease is made to a man and his heirs, during lives, the heir does not take by descent, but as a special occupant; and though it be called a descendible freehold, it is not really a descent,

(*o*) Perhaps the view which we have shewn in the 1st section of the 2d Chapter of the first Part of this Work, to have been taken in our courts of the operation of a will of land as an actual inchoate disposition, to take effect, and receive its consummation upon the death of the devisor, was in some measure the reason of Lord Kenyon's dictum in Doe *v.* Luxton, 6 T. R. 293. that a person possessed of an estate *pur auter vie*, under a grant to him and the heirs of his body, with remainders over, may cut off the remainders and make a complete disposition of the whole estate by his *will* alone.

It appears in the case of Campbell *v.* Sandys, 1 Schoales and Lefroy's Reports 294., that this opinion of Lord Kenyon's was not agreeable to the sentiments of Lord Redesdale, who observed that he could find no decision that at all warranted that opinion; and his Lordship declared himself to think that on principle a will could not have that effect. But he appeared to ground this objection on a view of the nature and operation of a will somewhat different from that which was taken of it by Lord Holt, Lord Trevor, Lord Mansfield, and Lord Loughborough, as appears in the Part of this Work above referred to. He seems not to have regarded it so much as a disposition or appointment of the lands in the nature of a conveyance, as the mere designation of the special heir, against the right of the person to whom the property would otherwise devolve.

(*p*) 3 P. Wms. 368.

being no more than if there had been a designation of any person by name to enjoy the estate for three lives, after the death of the father, instead of the heir at law. It has been accordingly holden, that in such a case the parol shall not demur, which is always allowed in the case of a proper descent to an infant. And it is also to be observed, that such a succession to this estate is no descent to toll an entry. (*q*) Accordingly if a disseisor make a lease to a man and his heirs, during the life of I. S., and the lessee die, living I. S., the entry of the disseisee is not thereby taken away, because he that died seised had but a freehold, and the heirs are added to prevent the occupant. (*r*) So that from this reasoning it results that this estate is not so properly a descendible freehold, as a freehold limited to go in a course of descent; which limitation prescribes only who shall be the occupant, without changing the nature of the estate into an inheritance (4). Yet Lord Vaughan observes, that the heir of the grantee *pur auter vie* might certainly recover by a writ of mortdancester, in case of abatement, which, he says, infallibly proves the heir to take by descent, as succeeding to one who died seised *as of a fee*, though not seised *in fee;* for which he cites Bracton (5). But in Walsingham's case, in Plowden, the learned Apprentice

(*q*) Litt. Sect. 387. (*r*) Co. Litt. 239 *a*.

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(4) It is true the course of succession must certainly follow the inheritable quality of the land. Thus it has been held that where a lease was made to a man and his heirs, during three lives, of lands in Borough English, the youngest son shall inherit this descendible freehold. But there the special occupancy is only regulated, as in the other cases, by the descriptive force of the word *heir*, taken *secundum subjectam materiam*. 2 Freem. 395, 399. Co. Litt. 110 *b*.

(5) Si autem fiat donatio sic, ad vitam donatoris, donatorio et hæredibus suis; si donatorius præmoriatur hæredes ei succedent, tenendum ad vitam donatoris, et per assisam mortis antecessoris recuperabunt, qui obiit ut de feodo. Bract. 1. 2. De acquirendo Rerum Dominio, c. 9.

stated *arguendo* that the heir in such a case should not have an assize of mortdancester, and he was not contradicted.

If a man grant an annuity to another to hold to him and his heirs for the term of another's life, and the grantee die during the life of the *cestui que vie,* his heir shall have it, according to Littleton, (*s*) who nevertheless concludes with a *quære de ista materia.* Upon which Lord Coke observes, that in the case of land the heir shall have it, to prevent an occupant; and so it is in the case of an annuity, or of any other thing that lies in grant, whereof there can be no occupant (6).

It is worthy of observation, that in Swinnerton's case, in Dyer, (*t*) where a rent was granted by fine to F. to hold to him and his assigns during the life of Cassandra, the grantor's wife, and if it should be behind, *quod bene licuit dicto* F. *et hæredibus suis durante vita dictæ Cassandræ distringere,* and F. devised the rent and died, living Cassandra, Dyer was of opinion that the devisee should have it, for by the clause of distress F. had the fee simple determinable upon the death of Cassandra; which seems an extraordinary opinion, and certainly opposed by the resolution in Chudleigh's case, (*u*) and numerous other authorities, wherein it has been uniformly held, and never doubted, that an estate to one and *his heirs;* during the life of I. S. is but an estate for life, upon which a remainder may depend. And the three classes into which a fee is distributed by the

(*s*) Sect. 739. (*t*) Dyer 252. (*u*) 1 Rep. fo. 4 *b*.

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(6) At law there could be no *general* occupant of a rent; as, if a rent were granted to A. for the life of B., and A. had died, living B., the rent would have determined, 2 Roll. Abr. 150. But there might have been a *special* occupant. Under the statute of Frauds, however, every estate *pur auter vie,* whether corporeal or incorporeal, is made devisable; and if not devised away, is made assets in the hands of the heir, if limited to the grantee and his heirs; and if not limited to the heirs, is made assets in the hands of the executors or administrators of the grantee.

very learned reporter, in his own argument, in Walsingham's case, clearly excludes this estate out of any description of a fee; either of the fee simple, the fee simple determinable, or the base fee (7).

The question, upon the whole, seems to remain in some uncertainty as to the true nature of the estate where the grant is expressly to a man and his heirs *pur auter vie,* though the preponderance of authority seems to be on the side of the doctrine which treats it as a freehold to which the heir succeeds as occupant by special designation, and not by regular title of descent.

Whether an executor might be a special occupant.

There has been some controversy on the question, whether a lease, before the statute of Frauds, to a man and his executors during the life of another, would go to the executor as a special occupant. Mr. Hargrave has put this matter doubtingly in his notes to Coke Littleton (*x*) where he says, after citing some authorities the other way, "however some have thought that executors and administrators, if named in the grant, might take an estate *pur auter vie,* though a freehold, even before the statutes 29 Car. 2. c. 3. and 14 Geo. 2. c. 20. by which they are now entitled." In Westfaling *v.* Westfaling, (*y*) Lord Hardwicke declared his opinion, that executors might take as special occupants; and he further added, that he thought it would be assets in their hands. The same opinion is intimated by him in Williams *v.* Jekyll. (*z*) And his reason for holding such estate, so limited, to be assets, was, that he thought the executor, by force of his office, could take nothing without its being so.

(*x*) Hargr. Co. Litt. 41 *b.* (*y*) 3 Atk. 466.
(*z*) 2 Ves. 681.

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(7) Plowd. Com. 557. And see Cro. El. 805, where Popham said, that rent granted to one and his heirs for the life of I. S. shall not be devisable by the statutes 32 & 34 H. 8. for it is no fee; and he added, that the greater part of the Judges were of his opinion. But Gawdy and Fenner, *contra.*

In the Duke of Devon *v.* Kinton (8), where A. having an estate to him and his *heirs* for three lives, settled it on his daughter and her husband for their lives, remainder to the use of his own *executors* and *administrators*, and after the death of his daughter and her husband, devised the estate to his wife and died indebted by simple contract, the question being whether the residue of the term should be assets to pay a simple contract creditor, it was so decreed; for being limited to the *executors and administrators* of A., it became personal estate; and he could not devise it exempt from his debts, though due by simple contract.

There appears, indeed, to have been a stronger reason for saying that an *administrator* could not take as a special occupant, since the law will not suffer a freehold to be in suspense; and, a person to entitle himself as special occupant must enter immediately on the death of the tenant *pur auter vie*, which an administrator cannot do, though an executor may. (*a*)

In what quality and capacity the executor holds the estate.

It seems as if the framers of the statute 29 Car. 2. meant to apply the term *special occupant* only to the *heir*. The words, '*that in case there shall be no special occupant it shall go to the executors and be assets*,' seem to include the case where the grant is express to the executors of the grantee; for if the executor *cannot* take as special occupant, it is as if he had not been named in the grant, and then the statute gives it to him for want of a special occupant.

If he can take as special occupant, it seems absurd to say that the statute could mean that in that character he should take for his own benefit; or, that if named in the grant, he should take for his own benefit; and if not

(*a*) Moor, 664. 907.

(8) 2 Vern. 719.: but in 2 P. Wms. 360. it appears that the lease was originally granted to trustees.

named, that then the estate should be assets in his hands If he should be held to take as special occupant, by reading the words 'special occupant' in the statute, as if they had been *such* special occupant; and as applying to the heir only, whose case had just been mentioned, the case of the limitation to executors is brought fairly within the statute; and then the construction would be, that if the grant was not to the heirs, the estate should, whether executors and administrators were named or not, go to the executors or administrators as assets. But we have seen that even if such estate limited to executors and administrators were held to be out of the statute altogether, still there is both reason and authority for saying that by force of their office simply, the property coming to them must be assets in their hands.

The statute of 29 Car. 2. c. 3. makes these estates coming to the heir by limitation, and as special occupant, for want of being devised, (and by the same statute they can only be devised by a will attested by three witnesses) assets for specialty creditors; and in the hands of the executors or administrators, where there is no special occupant, assets for both specialty and simple contract creditors. The statute of 14 Geo. 2. c. 20. s. 9. looking to the case where there is no devise or occupancy, partially provided for by the statute 29 Car. 2., makes the surplus after payment of debts applicable and distributable as personal estate. And when the force of the words "shall be applied and distributed" are properly attended to, there seems to be good ground for inferring that the Legislature intended that the executor should not retain this surplus beyond the amount of the debts, as special occupant.

Supposing, under these circumstances a person to make a will, devising the residue of his personalty, but unattested according to the statute of Frauds, and therefore not operating immediately upon the estate itself, that being still in its nature freehold, though at least to a certain extent under the above-mentioned

statutes beneficially applicable as personalty,—what is to become in a court of equity of the interest after debts paid? Is it to go to the legatee, to the heir, to the next of kin, or to be retained by the executor?

Lord Cowper (*b*) made no difficulty of holding it to be personal estate, though originally granted to a man and his heirs, if it was afterwards by him granted to executors.

In Westfaling *v.* Westfaling, above cited, it appears to have been also the opinion of Lord Hardwicke, that an estate *pur auter vie* to a man, his executors, administrators, and assigns, was assets to pay debts *before* the statute. And in Oldham *v.* Pickering, (*c*) which was before the statute Geo. 2. (as that case is reported in Carthew) Lord Holt seemed to entertain a degree of doubt whether such an estate was not assets to pay legacies. It appears indeed to have been the opinion of the annotator upon the case of the Duke of Devon *v.* Atkins, in Peere Williams, first edition, that there was ground for saying, that if the executor or administrator took it as special occupant, the effect of his character as executor or administrator would fix upon his legal title an equity for those who claim the personal estate, to make him a *trustee*.

It seems, therefore, that the fate of property so circumstanced was not very well settled, independently of the statutes of Charles II. and George II. We perceive too, by the recital in the clause relating to this subject, in the statute of Geo. 2. c. 14. that doubts had existed after the provision by the 12th Section of the statute 29 Car. 2. c. 3. as to the persons to take after the payment of the debts, and that the clause in question of the 14th Geo. 2. was made to exclude such doubts. By this statute of George II. therefore it was provided that the surplus should be *applied* and distributed as

(*b*) 2 Vern. 719. 2 P. Wms. 380.
(*c*) 1 Lord Raym. 96. Carth. 376.

personal estate. Upon which clause the present Chancellor declared himself to have a strong inclination that the meaning was that the residuum of such estate was to go with the rest of the personalty, where there was a will, and to the next of kin where there was an intestacy; and that the language of the statute would bear this out, for it would be extraordinary that persons claiming by bequest should not have been attended to, when even upon the statute of Charles II. Lord Holt doubted as to legacies.

The true state of the question in Ripley *v.* Waterworth (*d*) was, whether, if notwithstanding the statutes of Car. 2. and Geo. 2. the interest in such an estate comes to the executor in the nature of a freehold, though by force of those statutes applicable to a certain extent as personalty, a will not *attested by three witnesses*, but disposing of the residue of the personalty, will give to the residuary legatee, after the debts paid, a title to call upon the executor for his benefit. Upon this case Lord Eldon observed, that he could not adopt the principle of considering the estate as personal, to the point of giving creditors a claim upon it, without going farther. His Lordship was of opinion, that after the debts were paid in obedience to the statute, the character of executor still remained in him, whether considered as special occupant or not; that such character raised a trust in *him*, and an interest in *others*. To the extent, therefore, of giving an interest to all, who were in a situation to claim the personal estate, it *was* personal estate.

It is to be observed, that in such a case the heir could have no title; for he could only take as special occupant, and if as special occupant, still as occupant; and there could be no occupancy without a previous vacancy, whereas the estate in the case supposed would be full of the executor. If the executor has it, the great question is, how he has it? is it freehold or per-

(*d*) 7 Ves. Jun. 425.

sonal estate? (*e*) Is that which by one statute has been made personal to the extent of being assets, and therefore subject to be sold as such upon a *fieri facias*, (*f*) and by another statute distributable under administration out of the spiritual court, still to be considered as in the nature of freehold in the hands of the executor, with respect to any person claiming the personal estate? There is besides great difficulty in saying what shall become of such an estate with this ambiguous sort of character belonging to it, in case of the death of the executor, if he takes it as special occupant in the nature of a freehold. Such a case would be surrounded with difficulties. (*g*) Since, however, the statute uses only the expression *pur auter vie*, not distinguishing between the grant to a man's heirs and to his executors, in imposing the necessity for three witnesses to validate a devise of it, the residue in the case above alluded to would not pass strictly by the will. But Lord Eldon was of opinion, that in a court of equity the estate was to be considered as belonging to those who take personal estate by an equity attaching upon the character of executor *as* executor. And he resembled it to the case of stock which can properly be disposed of only by a will with two witnesses; (9) but which, according to Lord Thurlow, where it is not so bequeathed, devolves upon the executor in trust for those who are entitled to the personal estate, under the residuary bequest; the will operating as a direction to the executor how to apply it, though it was not in strictness devised by the will. (*h*)

(*e*) Atkinson *v.* Baker, 4 T. R. 231.
(*f*) See Oldereon *v.* Pickering, 1 Lord Raym. 96. Comb. 291.
(*g*) 7 Ves. Jun. 445. 451.
(*h*) 7 Ves. Jun. 448. 452.

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(9) By 33 Geo. 3. c. 28. s. 14. and 35 Geo. 3. c. 14. s. 16. it is provided that all persons possessed of any share or interest in the funds, or any estate therein, may devise the same by will in writing, *attested by two or more credible witnesses.*

Upon the whole, therefore, as the question now stands, upon the authority of the much reasoned case of Ripley *v.* Waterworth, an estate granted to a man, his executors, administrators, and assigns, for the life of another, though devisable as to the legal interest only by a will with three witnesses, is in equitable consideration, personal estate, or in the nature of personal estate, in the hands of the executor; and the benefit as to the surplus belongs to the legatee under the will as such, though the will is not attested so as to pass it at law. In a word, it is personal estate as to those claiming as creditors and representatives. But yet the essential character of the estate as a freehold remains, as to other persons, who can only take the legal interest in it by a conveyance applicable to freehold property.

SECT. VI.

Appointment of Guardians by Will.

THE principal object of the statute 4 and 5 Philip and Mary, c. 8. was to prevent the practice of taking away or marrying maidens under sixteen, against the consent of their parents: and, as Mr. Hargrave (1) has observed, the statute prohibited it in terms which implied that the custody and education of such females should belong to the father and mother, *or the person appointed by the former,* by his last will, or by act in his lifetime. But this statute applied only to the case of *female* children. The object of giving to the father this appointment was more generally pro-

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(1) See Hargr. Co. Litt. 89. a. (14). The Reader is referred to the Notes of this gentleman on the Commentary upon Littleton for a most able and instructive investigation of the learning respecting the several sorts of guardianship known to our law.

vided for by the statute 12 Car. 2. c. 24. sect. 8, 9., which enacts, that "where any person shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall be lawful for the father of such child or children, whether born at the time of the decease of such father, or at that time *en ventre sa mere*, or whether such father be within the age of twenty-one years or at full age, by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall think fit, to dispose of the custody and tuition of such child or children, during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons, in possession or remainder, other than Popish recusants; and such persons to whom the custody of such child shall be so disposed or devised, may maintain an action of ravishment of ward, or trespass against any person who shall wrongfully take away or detain any such child, for the recovery of such child, and recover damages for the same, in the same action for the use and benefit of such child. And such person to whom the custody of such child shall be so disposed or devised may take into his custody to the use of such child, the profits of all lands, tenements, and hereditaments of such child, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child till his or her age of twenty-one years, or any less time, according to such disposition aforesaid, and may bring such actions in relation thereto as by law a guardian in common socage may do.

Guardianship at common law, and by custom.

Before entering upon the consideration of this statute of Charles, it seems proper to make a few observations on the guardianships at common law and by custom.

By the custom of the province of York (which custom the statute of 12 Car. 2., being general, does of

course control wherever they are in opposition), the father, by his last will and testament, might for a time commit the tuition of his child and the custody of his person; which testament and appointment was to be confirmed by the ordinary, who was to carry the same into execution. And upon the omission of the father to exercise his power, the mother might, after his death, make a similar appointment. And as the statute confines the power of appointing a testamentary guardian to the father only, the custom still operates within its local extent, to give an authority to the mother in respect to the personal estate (to which only the custom extends) which she would not possess by virtue of the statute. The statute of Charles the Second has no negative words to restrain the custom in this respect.

Guardianship by chivalry when abolished.

By the same statute whereby the father's power of appointing a guardian of his children by will was created, the tenure by knight's service, out of which the guardianship by chivalry arose, was abolished; and with it fell to the ground this dominion of lords over the heirs of their tenants, which was as inconsistent with the rights and duties of nature, as with the principles of rational and liberal policy. For this guardian was not accountable for the profits made of the infant's land during the wardship; and though he is said to have been subject to the duty of maintaining the infant, in a manner agreeable to the fortune and rank of such infant, it does not well appear by what means he was to be compelled so to do. This guardianship existed rather for the interest and profit of the guardian, than as a trust for the benefit of the ward; and was saleable, transferable, and transmissible, like any other property.

By nature, nurture, and socage tenure.

The other descriptions of guardianship, by nature—by nurture—and that arising out of socage tenure, still subsist, though very little is now heard of them in our Courts, since this office is usually assigned under the statute abovementioned; and where that is neglected to

be done, the jurisdiction of the Lord Chancellor, now established, though of dubious and obscure origin, is generally resorted to. These three last-mentioned kinds of guardianship are all exercised with a responsibility for the profits of the estate. In the strict legal notion of a guardian by nature, it can be exercised only with respect to the heir apparent, and not the other children. Either father or mother may be such guardian; but the father has priority, and superior privileges. Thus while the tenure by knight's service continued, the father claiming this guardianship by nature, was entitled to the custody of the infant's *person*, even against the lord in chivalry; which was a preference not conceded by the law to the mother when happening to be guardian by nature, as she might be. The father and mother may also be the guardians by nurture, where that species of guardianship is let in by the want of any other superior claims, for it only takes place where the infant is not in circumstances to attract any other description of guardian. This extends no further than to the custody and government of the infant's person, and determines at fourteen in both males and females.

The guardianship in socage can only take place on a descent like the guardianship by chivalry; and arises only where the infant is seised of lands, or other hereditaments lying in tenure, and holden by socage. The title to it is in such only of the infant's next of blood as cannot be inheritors, according to the laws of descent in real property, to the socage estate, and is not restricted to the whole blood. And the quality which principally distinguishes this guardianship from the guardianship in chivalry is, that it is a personal trust wholly for the benefit and interest of the infant. The power of this guardian over personal estate has been doubted: but the learned Editor of Coke on Littleton has observed, that the custody of the person should seem to draw after it the custody of every description of property for which the law has not otherwise provided: which idea, he adds, receives countenance from the instance of copy-

holds and inheritances not lying in tenure being placed by the law in the hands of this guardian, which can only be accounted for by the same reasons which may be given for including personalty under the same custody. And he further remarks that this opinion is strongly confirmed by the manner in which the 12 Car. 2. c. 24. regulates the powers of the guardian which it enables a father to appoint; for that statute authorizes such guardian to take the custody of the infant's personal estate, as well as of his lands, tenements, and hereditaments, and provides that he may bring such action or actions in relation thereto, as by law a guardian in common socage might do. (*i*) There is a remark, however, of Lord Chief Justice Vaughan (*k*) which conveys a different opinion; for, speaking of the guardian under the statute, he says, "this new guardian hath the custody not only of the lands descended or left by the father, but of lands and goods any way acquired or purchased by the infant, which the guardian in socage had not."

The guardianship by socage expires when the infant, either male or female, attains fourteen; and the interval between fourteen and twenty-one is said to belong to the guardian by nature, if no other appointed.

But this guardianship, as all others which might otherwise take place at the death of the father is superseded by the exercise of the power given him by the statute 12 Car. 2. c. 24. which professedly proceeds upon the model of the guardianship by socage.

Testamentary appointment.

Under this statute it is clear upon the words that none but the father can appoint; and it is held equally clear according to the sense, that the guardian appointed by him cannot appoint another guardian; for it is a personal trust, and not assignable. (*l*)

The power as to its objects is held to be confined to *legitimate* children, (in which are included those *ex ventre sa mere*,) and by the words of the statute these

(*i*) Fonbl. Treat. Eq. 3d ed. p. 242.
(*k*) Vaugh. 186.
(*l*) Vaugh. 179.

must be under twenty-one, and unmarried, at the decease of the father. It extends not to illegitimate children; though such, if females, have been held to be within the statute of Philip and Mary (2).

Probate not necessary to the validity of the appointment under the statute.

If the will be made merely for naming a guardian under this statute, and for no other purpose, such will need not be proved in the spiritual court; for as in such case the appointment takes effect solely by force of the statute, the temporal courts are the proper judges thereof. (*m*) But if the will contains also dispositions of the personalty, it seems that the whole will must be proved, which probate will be effectual so far as the personalty is concerned, but of no avail in respect to the appointment of guardian. And it seems to be immaterial by what words the appointment is signified, if the meaning sufficiently appears. (*n*)

Appointment may be made by deed. And such appointment is revocable by will. But such will must be duly executed.

If the father exercises his power of appointment under the statute by deed, as he may, it has been held that such disposition by deed may be revoked by will. (*o*) But no appointment can be revoked by a subsequent testamentary appointment, unless it be executed with the due formalities, or directly import to be a revocation.

Infancy of the parties.

Where the appointment has been made, the guardianship shall not be determined by the marriage of the infant before twenty-one, for the statute declares that such guardianship shall continue during the time that he shall remain under twenty-one. The father, though under age himself, may appoint by virtue of this statute; and though he could not devise the land in trust for the

(*m*) 1 Vent. 207. Lady Chester's Case.
(*n*) Swinb. p. 3. c. 12.
(*o*) Finch's Rep. 323. Lord Shaftesbury *v.* Hannam.

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(2) See Strange 1162, Rex *v.* Corneforth. But the Court will, unless there is some objection, adopt the nomination of the father. 2 Bro. C. C. 583. Ward *v.* St. Paul, and note. So it seems also if the appointment be not made agreeably to the statute. Dick. 527. May *v.* May.

infant directly, yet the land will follow as an incident by law attending upon the custody of the heir. (*q*)

Remedies.

The guardian, when regularly appointed under this statute, takes place of all other guardians; and may have a writ of ravishment of ward if the infant be taken from him, as the guardian by knight's service, or by socage, might have had at common law, and shall recover damages as for the ward's benefit. (*r*)

This guardian being constituted upon the model of the socage guardian, and coming in the place of the father, has an interest joined with his trust, though not an interest for himself. (*s*) But though it was agreed in the case of Parry *v.* Hodgson, (*t*) that a testamentary guardian by the statute, until the infant was twenty-one years, had the same interest as a guardian in socage till the infant was fourteen; yet it was holden that a testamentary guardian could not make a lease of the infant's land, but that such lease was absolutely void.

Powers of a testamentary guardian.

It seems he may pay out of the rents and profits the interest of any real incumbrance, and even the principal of a mortgage: (*u*) but it has been held that he is not compellable to apply the profits of the infant's estate to pay off the bond debts of the ancestor. (*x*) Nor can he, without the direction of the Court, convert the real into personal, or the personal into real estate. (*y*) He is subject to an action of account as soon as his guardianship is at an end, but not before; for the rule of the common law is, that an action of account does not lie while the guardianship continues. However, in equity, the infant may, by *prochein ami*, sue his guardian for an account during the minority. That Court, it is said, often gives extrajudicial directions for an infant, and hears an indifferent person as *amicus curiæ*. And it was observed,

(*q*) Vaughan 187.

(*r*) See the case of Mr. J. Eyre *v.* the Countess of Shaftesbury, 2 P. Wms. 103.

(*s*) Vaughan 181. 2 P. Wms. 122.

(*t*) 2 Wils. 129, 135.

(*u*) Prec. in Ch. 137.

(*x*) 2 Vern. 606.

(*y*) 1 Vern. 403, 435.

by Lord Hardwicke, that in Lord Macclesfield's time, in the case of Lord Dudley, a stranger came and complained of the abuse of the infant's estate by the guardian; and upon this application, and his undertaking to pay the costs, the Court directed the Master to examine the receiver's accounts, and see whether the infant was wronged or not. (z) By the statute 4 Anne, c. 16. actions of account may be brought against the executors or administrators of guardians. But a guardian is entitled to all his reasonable costs and expenses; and, therefore, he ought not to be charged as receiver, because then it seems he would lose these costs and expenses, but as guardian, by name; for costs, it is said, are in general allowed only to guardians or bailiffs, as such, and not to mere receivers. (a)

SECT. VII.

Statute of Fraudulent Devises.

A DEBTOR by specialties might, by devising his lands, have deprived his specialty creditors of all remedy against this part of his property, until the statute 3 & 4 William and Mary, c. 14. was passed. But by this statute, "reciting that it was not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts,' it was enacted "that all wills and testaments, limitations, dispositions, and appointments of or concerning any manors, messuages, lands, tenements, and hereditaments, or of any rent, profit, term, or charge out of the same, whereof any person, at the time of his or her decease,

(z) Earl of Pomfret v. Lord Windsor, 2 Ves. 484. See also 2 P. Wms. 119. 3 Atk. 625.

(a) 1 Freem. 178. 1 Leo. 219. and see the statute 4 Anne, c. 16. sec. 27.

should be seised in fee simple in possession, reversion, or remainder, or have power to dispose of the same by his or her last will and testament thereafter to be made, should be deemed and taken, only as against such creditor or creditors as aforesaid, his, her, or their heirs, successors, executors, administrators, and assigns, and every of them, to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect."

And by section 3. "for the means that such creditors may be enabled to recover their said debts," it was enacted, "that in the cases before mentioned, every such creditor or creditors should and might have and maintain his, her, or their action of debt upon his, her, or their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee or devisees jointly; and such devisee or devisees should be liable and chargeable for a false plea by *him* or them pleaded, or for not confessing the lands or tenements to him descended."

And by section 4. it was enacted, "that where there should be any limitation or appointment, devise or disposition, of or concerning any manors, &c. for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person other than the heir at law, according to or in pursuance of any marriage contract, or agreement in writing, *bona fide* made before such marriage, the same and every of them should be in full force; and the same manors, &c. should be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as should be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, should be raised, paid, and satisfied."

And, lastly, it was enacted, "that all and every de-

visee and devisees made liable by that act, should be liable and chargeable in the same manner as the heir at law, by force of that act, notwithstanding the lands, tenements, and hereditaments to him or them devised should be aliened before the action brought."

This statute, in respect to this part of its provisions, may be considered as suppletory to that of the 13 Eliz. c. 5. against fraudulent conveyances, and as designed to extend the remedy to fraudulent devises.

It has been determined that an action of covenant does not come within the remedy given by this statute, which is confined to cases of debt; for though the word specialties is used as well as bonds, yet when the means of recovery are provided, the intention of the statute is plainly confined to debts, and those specialties on which an action of debt lies. The statute speaks throughout of debts, and a breach of covenant cannot be considered as a debt. It prescribes the means by which such creditors shall recover their debts, and in prescribing those means it only gives the action of debt. (*b*)

Of the excepting clause, saving devises and dispositions for payment of debts.

This act contains, as appears from what has been above recited, a clause saving the effect of such devises and dispositions as are for the payment of debts, which clause has been held to operate simply as an exception, leaving the case of a devise for the above purpose, as well as provisions of portions for children in pursuance of marriage contracts, entirely unaffected, and open to the same remedy and resort as before the statute. (*c*) Since at common law there was no remedy against a devisee in trust for payment of debts, such a case always was and still continues to be, since the statute, the subject of equitable jurisdiction; and accordingly the assets are equitably distributable, that is, equally and *pari passu* amongst all the creditors, whether by specialty or simple contract.

(*b*) 7 East 128. Wilson *v.* Knubley.
(*c*) 2 Atk. 292. Plunket *v.* Penson.

A devise for payment of debts out of the rents and profits only has been clearly held within the exception. (*d*) And it appears to have been the opinion of Lord C. J. Willes, that by virtue of the above mentioned clause, a devise for the payment of any particular debt upon simple contract is a good devise against bond creditors. (*e*)

Extends to charges of debts in equity.

If a devise for payment of debts does not provide for it in a practicable manner, the case is not within the exception. (*f*) But since the case of Bailey *v.* Ekins, (*g*) the rule appears to be settled, that if the provision made by the will for the payment of debts be effectual, either at law or in equity, the case is out of the statute: so that if the will, instead of breaking the descent by a regular devise, only charges the estate with the debts of the testator, this provision is good notwithstanding the statute of Fraudulent Devises, and a court of equity will act upon it; which is the same thing as to say that the interest so provided, and which equity draws out of the mass going to the heir, is distributable as equitable assets, among all the creditors equally, and without any regard to the precedency of specialty creditors.

Assets, whether equitable or legal.

Lord Hardwicke in Plunket *v.* Penson, (*h*) seemed to be of opinion, that it was necessary the descent should be broken to make the assets equitable; and that if the estate were suffered to descend charged to the heir, or if the heir were made the trustee, (1) the de-

(*d*) 2 Atk. 204. Ridout *v.* Earl of Plymouth.

(*e*) Willes 524. Gott *v.* Atkinson.

(*f*) 2 Brown, Ch. Rep. 614.

(*g*) 7 Ves. Jun. 319. and see 8 Ves. Jun. 26. Shiphard *v.* Lutwidge.

(*h*) 2 Atk. 290.

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(1) A devise giving lands as the law would give it, in case there were no devise, is inoperative and void; and therefore if the legal estate be devised to the heir in trust, the descent of the legal estate is unbroken, and the devise has merely an equitable operation. See Hed-

scent being unbroken, the assets should be considered as legal assets; distinguishing such case from that of the devise of an estate to a stranger charged with the payment of debts which by breaking the descent would make the assets equitable. (*i*) But Lord Eldon, in the late case of Bailey *v.* Ekins, observed, that the rule cannot be accurate when it is stated that the descent ought to be broken.

If we suppose a devise to trustees in trust to pay debts, and all the trustees to die in the lifetime of the testator, the estate must descend upon the heir: but it is clear the assets would be equitable. By the failure of the devise the heir must have it, as the trustees would have had it, subject to the debts; and yet the descent is not broken. (*2*)

(*i*) See 1 P. Wms. 430. Freemoult *v.* Dedire.

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ger *v.* Rowe, 3 Lev. 127. But if the quality of the estate be altered, the descent is broken; as if the devise create a joint-tenancy or tenancy in common, where the descent would carry the estate in coparcenary. 3 Lev. 128. Hob. 30. But merely charging the estate does not break the descent. See 2 Lord Raym. 829. Reading *v.* Rawsterne. If a mere trust estate descend, it will be legal assets, since a trust estate descending is made assets by the statute of Frauds. But, it seems, an equity of redemption of the fee, not being so converted by that statute, is considered as equitable assets. 2 Atk. 294. 3 P. Wms. 342.

(2) These devises are greatly promoted in equity. A devise of lands for payment of debts was formerly held to include those upon which the statute of Limitation had run, 2 P. Wms. 373. and see 3 P. Wms. 89. Cowp. 548. 2 Vern. 141. Gofton *v.* Mill. But this general doctrine appears to have undergone some modification; and the distinction seems to be between those debts in respect to which the period has already been completed in the testator's life, which are still to be presumed to be paid; and those upon which the statute has not run; which are not subject to be barred by its running after the death of the testator; for the trustee's neglect shall not prejudice the creditor. Executors of Fergus *v.* Gore, 1 Sch. and Lef. 107. Where debts are directed to be paid out of rents and profits, the Court will, if necessary, decree a sale. Berry *v.* Asham, 2 Vern. 26. Though perhaps it could be otherwise if out of the annual rents. 1 Vern. 104. So equity

The action, by the express direction of the statute, must be brought against the heir and devisee jointly; and courts of equity hold themselves equally bound by the statute in this respect, and insist upon the heir's being made a party to the proceedings; for it is only by the Act that the property becomes assets in the hands of the devisee; and as that statute requires the heir to be a co-defendant, the remedy must be followed as it is prescribed, and a bill in equity is as an action at law. Perhaps, if the heir could not be found, the bill might charge that the Plaintiff had made enquiry, and could not discover the heir. (*k*)

If the heir happen to be made a joint devisee with others, then the action should be against the heir and devisees jointly, charging the heir both as heir and devisee. Supposing the estate be limited to several in succession by the devise, it seems proper to make them all defendants in respect of their estates; as where property is devised to go in strict settlement, making a tenant for a life, with remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the tenant for life in tail, it would be prudent, if not absolutely necessary, to make the heir, together with the tenant for life, the trustees to preserve, and the son or sons of the tenant for life, parties; and as the sons do not claim by descent, the parol could not demur. It is said, indeed, to be the general rule, that where a devise is fraudulent under this statute, and the heir there-

(*k*) 1 P. Wms. 99. Gawler *v.* Wade. 2 Atk. 125. Warren *v.* Stawell. For the proper form of declaring against the heir and devisee jointly, see Clift's Entries, 243. pl. 19.

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has supplied the want of a surrender of a copyhold to the use of the will, where it has been devised for payment of debts, as well as where the devise has been for a wife or children unprovided. 2 P. Wms. 490. 12 Ves. Jun. 216. The doctrine of election does not prevail against creditors taking benefit under a devise for payment of debts, and disputing the will in other respects, Kidney *v.* Coussmaker, 12 Ves. Jun. 136.

by becomes subject to the action, together with the devisee, by virtue thereof, if such heir is an infant, the parol cannot demur. (*l*)

In respect to estates *pur auter vie* it should be observed, that as by the statute of Frauds, 29 Car. 2. c. 3. s. 12, an estate *pur auter vie*, which comes to the heir as special occupant, is made assets by descent and devisable by a will in writing signed by the devisor, and attested in his presence by three or more witnesses; so a devise of such an estate is also held to come within the statute of Fraudulent devises, and to be void against specialty creditors. (*m*)

We must not omit in this place to notice the late Act passed in the 47th year of his late Majesty Geo. 3. c. 74. "for more effectually securing the payment of the debts of traders;" whereby it was enacted that, "when any person being at the time of his death a trader, within the true intent and meaning of the laws relating to bankrupts, shall die seised of, or entitled to, any estate or interest in lands, tenements, hereditaments, or other real estate, which he shall not by his last will have charged with, or devised subject to, or for the payment of his debts, and which before the passing of that Act would have been assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in Courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they were before the passing of that Act liable to, at the suit of creditors by specialty, on which the heirs were bound; provided al-

(*l*) See Beaumont *v.* Thorp, 1 Ves. 27.; and as to the mode of pleading by the heir and devisee, see Gott *v.* Atkinson, Willes 527.

(*m*) See Westfaling *v.* Westfaling, 3 Atk. 465.

ways that in the administration of assets by Courts of equity under and by virtue of that Act, all creditors by specialty, in which the heir would be bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract, or by specialty in which the heirs were not bound, shall be paid any part of their demands."

PART III.

CONSTRUCTION OF WILLS.

CHAP. I.

General Principles and Rules.

IT would be very tedious to enumerate, and nearly impossible to arrange under heads, the constructions which particular limitations and expressions in wills have received as they have passed successively under the review of the Courts of Justice, and lie dispersed among our books of Reports: but from those cases and decisions many rules and maxims may be collected, which, by being placed before the Reader with some regard to their order and connection, may serve to guide him in the perusal of the cases themselves, and to lay their principles more open to his research, so as to shorten and facilitate his labour. A preliminary Chapter, therefore, devoted to this purpose, has been thought a proper introduction to the Third Part of this Work; not forgetting the obvious propriety of confining our notice to such rules as have been pretty steady in their application, or have the warrant and authority of great judgment and experience.

Wills are generally construed from the making, unless circumstances or the tenor of them shew that the

construction should be with reference to the time of the death: the intermediate time is not to be regarded. (*a*)

The construction of wills must be the same in courts of law and equity. (*b*) And the devise of a trust is to be construed in the same manner as that of a legal estate, and not to be varied by subsequent accidents. (*c*)

Wills should be construed, as far as consistently may be, so as to preserve estates in the intended channel of descent. (*d*) And words tending to disinherit the heir at law will not have that effect, unless the estate is completely devised to another. (*e*) But the common expression in the books, that an heir shall not be disinherited, except by express words, or necessary implication, is incorrect: the proper terms of the rule are, that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited. (*f*) And where there is no ambiguity, it has long ago been said by great authority, that a devisee is as much favoured as an heir at law. (*g*)

The order of words is not to be regarded, but a transposition may be made to render a limitation or disposition sensible. (*h*) So likewise sentences may be transposed to preserve the meaning of a will. (*i*) But this can only be done to come at the meaning of the testator, and not to alter or affect the operation of the devise. It ought never to be done where the words are plain and sensible, much less to let in different devisees or legatees in a will: for to do that would be to make a new will. (*k*)

The intent of the testator is to be the rule of construction, if the words will bear it out: but the force

(*a*) See Lomax *v.* Holmden, 1 Ves. 295.

(*b*) 1 Bl. Rep. 377.

(*c*) 3 P. W. 259.

(*d*) Cro. Car. 185. 2 Ves. 615. 2 Stra. 798.

(*e*) Doug. 763.

(*f*) Moon d. Fag *v.* Heaseman, Willes 141.

(*g*) 6 Mod. 133. 2 Vern. 340.

(*h*) Hob. 75. 2 Ves. and B. 67. East *v.* Cook, *ib.* 74. Brice *v.* Smith, Willes 1.

(*i*) Leake *v.* Robinson, 2 Meriv. 386.

(*k*) *Ib. et vid.* 2 Leon. 165. Blackler *v.* Webb, 2 P. W. 384.

of the words may be such as to exclude all reasoning from probable intention. (*m*) Loose, general, and doubtful words may be rejected as surplusage, where they oppose a plain precedent devise, or the broad and manifest intent of the testator. (*n*) Effect ought to be given, if possible, to the whole will, and the intention should be collected from all the parts thereof to avoid repugnancy; (*o*) and a codicil is to be considered as part of it. (*p*) Such, indeed, is the respect due to intention, that a construction may be made to support it, when plain upon the whole will, even against strict grammatical rules. (*q*) But an express disposition cannot be controlled by inference. (*r*)

Words of desire are of imperative obligation, if the subject and object be certain; (*s*) unless there is plainly an option or discretion intended to be given. (*t*) If a testator uses technical phrases, he must be supposed to understand them, unless by other parts of the will he manifests the contrary. (*u*) *Primâ facie* words must be understood in their legal sense, unless a contrary intent plainly appear. (*x*)

When a testator uses a word which has a definite legal sense, and in another part of the will uses a different word in application to subjects of a similar nature, the technical word is not to be regulated or varied in its import, on the assumption that the testator had the

(*m*) Brownsword *v.* Edwards, 2 Ves. 246.

(*n*) Hob. 65. 6 Mod. 112.

(*o*) Leon. 229. 2 Bulst. 178. Gittins *v.* Steele, Swanst. 28.

(*p*) Gray *v.* Minethorpe, 3 Ves. Jun. 105.

(*q*) 11 Ves. Jun. 148.

(*r*) 1 Ves. Jun. 269.

(*s*) Prec. in Ch. 200. 1 Atk. edit. Sand. 467, note. 1 Bro. C. C. 142. 2 Bro. C. C. 48. Cary *v.* Cy, 2 Sch. and Lef. 189. And see Wright *v.* Atkyns, 1 Turn. 157.

(*t*) Cunliffe *v.* Cunliffe, Ambl. 686. Morris *v.* Bishop of Durham, 10 Ves. Jun. 522.

(*u*) Phillips *v.* Garth, 3 Bro. C. C. 60. Green *v.* Howard, 1 Bro. C. C. 31. 3 Bro. C. C. 234.

(*x*) Holloway *v.* Holloway, 5 Ves. Jun. 401. Winslow *v.* Tighe, 2 Ball. and Beat. 204.

same objects in view: though the import of a word used in a strict legal sense may be called in aid of looser and more doubtful expressions in other parts of a will applied to similar objects. (*y*) But the same words in different parts of a will should be construed in the same sense, (*z*) unless the general intention calls strongly for a different construction; and sometimes they may have a different force as applied to different subjects. (*a*)

If a testator expresses himself incorrectly, a court of law will supply proper words (*b*) if the intent be quite apparent from the whole context. In Doe *v.* Micklem above cited, it was observed by the Court, that the authorities there relied on were stronger than that case, for in them the structure of the sentence was perfect without any alteration or addition of words. (*c*) But mistakes in a will are never to be intended, if a reasonable construction can be found out; and the mistake must appear by fair inference from the whole will. (*d*)

General words will be controlled to render the whole will consistent: (*e*) but every word ought to have effect, if possible, so as it consist with the general intention; which, if manifest, must control the construction. (*f*)

(*y*) See Bagshaw *v.* Spencer, 2 Atk. 576.

(*z*) Whitmore *v.* Lord Craven, 2 Chan. Ca. 169.

(*a*) Forth *v.* Chapman, 2 Ves. 616.

(*b*) Dodson *v.* Hay, 3 Bro. C. C. 404. Doe d. Leach *v.* Mecklem, 6 East. 486.

(*c*) See Kentish *v.* Newman, 1 P. Wms. 234. And see also Newland *v.* Shephard, 2 P. Wms. 194., a strong case, and not approved of by Lord Hardwicke, Fonereau *v.* Fonereau, 3 Atk. 316. The rule in Molesworth *v.* Molesworth, 1 Cox 75., against supplying words, unless the case comes within the idea of a mere *error scribentis*, seems to be too narrow if compared with the principle which has governed the majority of the cases.

(*d*) Spark *v.* Purnell, Hob. 75. Purse *v.* Snaplin, 1 Atk. 415.

(*e*) Strong *v.* Teat, 2 Bur. 912. Doe d. Reade *v.* Reade, 8 T. R. 118. Whitmore *v.* Trelawney, 6 Ves. Jun. 129.

(*f*) Blandford *v.* Blandford, Roll. Rep. 319. Constantine *v.* Constantine, 6 Ves. Jun. 10.

The safest course is to abide by the words, unless upon the whole will there is something amounting almost to demonstration to shew, that the plain meaning of the words is not the meaning of the testator. (g) Thus, therefore, we may accept it as a safe position, that general words are not to be restrained, unless the Court sees abundant reason to conclude that the testator meant to use them in a restrained sense. (h) And that, wherever they have an obvious construction, they are not to be rejected upon a suspicion that the testator did not know what he meant by them. (i)

If words admit of a twofold construction, the rule is to adopt that which may tend to make good the instrument, and to effectuate rather than to frustrate; and if words are rejected or supplied by construction, it must always be in support of the intent. (k)

With respect to the clauses of a will, it is a safe rule that where there is no connection by grammatical construction, or direct words of reference, or by the declaration of some common purpose, between distinct devises of a will, the special terms of one devise cannot be drawn in aid of another, although in their import they may be similar, and are applicable to persons standing in the same degree of relation to the testator. (l) And it is an ordinary maxim that wherever a clause is express, positive, and particular, a subsequent clause shall not enlarge it. (m)

'And' must be read as 'or,' where such reading is necessary in order to put a reasonable construction on the will, (n) or where it is necessary to give effect to all

(g) Crooke v. De Vandes, 9 Ves. Jun. 205. and see Nannock v. Norton, 7 Ves. Jun. 391.

(h) *Per* Lord Mansfield in Goodtitle on d. Paul v. Paul, 2 Burr. 1089.

(i) Milner v. Slater, 8 Ves. Jun. 295.

(k) See *per* Lord Mansfield in Chapman v. Brown, 3 Burr. 1634.

(l) Wright on d. Compton v. Compton, 9 East 267.

(m) Roberts v. Kiffin, Barn. C.R. 261.

(n) 1 P. Wms. 434. 2 Atk. 643. 3 Atk. 86. 193. 408. 1 Swanst. 330.

the words. (*n*) So 'or' is sometimes to be read as a copulative; (*o*) and shall not where it comes at the end of a period, disjoin the preceding sentences, if the intent be against it. (*p*) A *videlicet* shall be rejected if repugnant: but not where it limits and restricts, if reconcileable with the sense and intent. (*q*)

The intention of a testator is not to fail, because it cannot take effect to the full extent; but it is to work as far as it can. (*r*) Neither the want of merit in the object, nor the want of prudence in the disposition, nor any disproportion in the amount of the property given, will afford a ground for controlling a will. (*s*)

(*n*) 3 Ves. Jun. 450. 6 Ves. Jun. 311. 7 Ves. Jun. 459.

(*o*) Cro. El. 525. Pollexf. 645. 2 Str. 1176. 3 Atk. 390. 1 Wils. 140. 9 East 366. 6 Ves. Jun. 341.

(*p*) 3 Atk. 391. 12 Ves. Jun. 112.

(*q*) Wilson *v.* Mount, 3 Ves. Jun. 194.

(*r*) Atkinson *v.* Hutchinson, 3 P. Wms. 259.

(*s*) Thellusson *v.* Woodford, 4 Ves. Jun. 312. *et seq.*

CHAP. II.

OF THE IMPORT OF WORDS AND PHRASES.

SECT. I.

As to Moveable Things.

Goods and chattels; what they comprehend.

"GOODS and chattels" are the most comprehensive terms of description for passing property of a personal nature by will. In the civil law all estates are divided into *bona mobilia* and *bona immobilia;* and it has been authoritatively said, that in wills relating to personal estate, words should be construed agreeably to the rules of the civil law. (*a*) Thus it may be regarded as settled that the word "goods" is sufficient in its general sense to pass the testator's leases (*b*) and bonds, where there is nothing expressed to afford an inference of its being used in a narrower signification. But though this is the original and technical sense of the word "goods," yet the word is very susceptible of modification from the context; and it will be seldom found to have this comprehensive effect except where it makes part of the residuary clause. Thus in the case of Crichton *v.* Symes, (*c*) where the bequest was in these words, *I give and bequeath to B. all my goods and wearing*

(*a*) Cro. Eliz. 387. 1 P. Wms. 267.

(*b*) 1 Eq. Ca. Abr. 199.

(*c*) 3 Atk. 61. And see Timeswell *v.* Perkins, 2 Atk. 102. 1 Bro. C. C. 127.

apparel, of what nature and kind soever, except my gold watch, Lord Chancellor Hardwicke decreed, that as these words stood in the will, the testatrix intended to give only her wearing apparel, ornaments of her person, and household goods and furniture, but no other part of her personal estate. And in another case, where, after a devise by a testator of all his household goods, and other goods, and all his stock, &c. he bequeathed the residue of his personal estate to J. S.; it was considered that if the devise of all the testator's goods were taken in its largest sense, it would frustrate the bequest of the residuum, which should not be allowed; and that it seemed reasonable that the words "other goods" should be understood to signify things of the same nature with household goods. The decree accordingly was, that the money, cash, and bonds passed by the residuary devise. (*d*)

Bonds and other choses in action have no locality, and therefore do not pass by a bequest of property in a particular place.

Bonds, being choses in action, and, as such, admitting of no locality, will not pass under a devise of "goods and chattels" *in a particular place,* though they happen to be there at the testator's death. (*e*) And the same may be said of bills of exchange, promissory notes, judgments, and records: but no doubt can be entertained that the word "goods" will extend *generally* to all these securities for money, since the debts themselves are clearly comprehended under the term. (*f*)

Bank-notes; whether to be considered as cash or as choses in action.

Money in specie passes under the words "goods or chattels;" and so will bank-notes, although the bequest should be confined to the goods and chattels in a particular house; bank-notes being regarded as in the nature of cash, rather than as choses in action. (*g*) It has, however, been held that, where a limited and express pecuniary legacy is given, and, by general words,

(*d*) Woolcomb *v.* Woolcomb, 3 P. Wms. 112. Rawlins *v.* Jennings, 13 Ves. Jun. 46.

(*e*) Chapman *v.* Hart, 1 Ves. 273.

(*f*) Moore *v.* Moore, 1 Bro. C. C. 128.

(*g*) 1 Ves. 273. But see this point doubted by Lord Eldon, in 11 Ves. Jun. 662.

all the goods and chattels in and about the house are afterwards bequeathed to the same person, money in the house will not pass to the legatee, on account of the particular legacy before devised to him. (*h*)

Of bequests of goods in a house, &c.

The general rule is, that where a testator devises all the goods in a house or place, the description will relate to, and comprehend, all such as shall be in the house, or place, at the time of the testator's death; and that if they happen to be removed to another place, in the lifetime of the testator, they will not pass. But this rule must be understood with some qualification; for if the goods are removed upon some sudden emergency, as on account of fire, inundation, &c., and before they can be returned to their place the testator dies, they shall be considered as if they were actually in the testator's house at his death; and the legacy is not defeated by such an accident. (*i*)

A bequest of "all my goods" is considered as bearing an import sufficiently large to carry the general residue. (*k*) But securities for money were held not to pass under a bequest of "goods in my custody." (*l*) Where a testator bequeathed all his goods and chattels in and about his house and outhouse, running horses were held to pass. (*m*) But "household goods" is a phrase of limited extent: thus under a bequest of the testator's household goods, and implements of household in and about his house, meat, and a clock not affixed to the freehold, were held to pass; but not the fire-arms of the testator. (*n*)

By the word "moveables," living subjects or things that may move themselves, as well as things that may be

(*h*) 2 Ch. Rep. 190. 2 Atk. 112. 3 P. Wms. 112.

(*i*) Chapman *v.* Hart, 1 Ves. 273. Moore *v.* Moore, 1 Bro. C. C. 128. Heseltine *v.* Heseltine, 3 Madd. 277.

(*k*) Crichton *v.* Symes, 3 Atk. 62. Anon. 1 P. Wms. 268.

(*l*) Green *v.* Simmonds, 1 Bro. C. C. 129 *n.*

(*m*) Lady Gower *v.* Lord Gower, Ambl. 612. And see Barton *v.* Cooke, 5 Ves. Jun. 464.

(*n*) Slanning *v.* Style, 3 P. Wms. 335.

moved, will pass.(*o*) And under a bequest of household stuff, it is said that all necessary household utensils belonging to personal comfort, or convenience of a family, as beds, tables, &c. are included. (*p*) A bequest of "linen and clothes of all kinds, except lace," was held to be confined to linen, being wearing apparel. (*q*) And under a bequest of "clothes and linen whatsoever," body linen only, and not table or bed linen, was held to pass. (*r*)

When the bequest is of a collective and fluctuating body; what passes.

When the subject matter of a bequest is a collective and fluctuating body, subsequent additions are considered as passing, notwithstanding the terms of the bequest are particular as to place and time. Thus it has been said, that if I devise all my flock of sheep *now* on such a hill, or in such a pasture, the sheep, subsequently produced, will pass; for it is within the reason of a devise of the personal estate, which being always fluctuating, shall relate to the time of the testator's death. And the same principle has been carried to the devise of the testator's library of books *now* in the custody of B., under which devise books subsequently added to the same library were held to pass. (*s*) So also in the case of General Guise, who by his will gave all his collection of pictures to Christ Church College, in Oxford, and afterwards sold some and added others to the collection, Lord Camden was clear that the pictures added to the collection passed, upon the principle that the personal estate is fluctuating. (*t*)

But in general cases the word *now* would be considered as restricting the devise to the present state of the thing given.

(*o*) Swinb. ed. 7. 930, 933.

(*p*) 2 Fonbl. Eq. 344. Masters *v.* Masters, 1 P. Wms. 435.

(*q*) Hunt *v.* Hart, 3 Bro. C. C. 311.

(*r*) Brooksbank *v.* Wentworth, 3 Atk. 63. Hunt *v.* Hunt, 3 Bro. C. C. 311.

(*s*) 1 P. Wms. 597. All Souls' Coll. *v.* Coddrington.

(*t*) Ambler, 641.

If I devise all the corn *now* in my barn, and part of the corn is afterwards consumed and fresh corn put in, Sir Joseph Jekyll (*x*) thought that such new corn would not pass; though the contrary is laid down in Swinburn. But if there be no such words importing individuality, as if a man devise all his plate, and makes subsequent purchases of plate, what he has at his death passes. (*y*)

Goods on board a ship.

In the important case of Chapman and Hart, (*z*) a difference was taken between a bequest of goods in a house, and of goods on board a ship. Lord Hardwicke observed, that the latter devise must be taken to be made with a consideration of the several contingencies and accidents they are liable to in such a situation; and if it should be determined that if by any accident they should not be on board at the testator's death, they would not pass, many marine wills would be defeated. If the goods were removed to preserve them, the ship being leaky or likely to founder, or if the testator be removed to another ship, (which is a contingency to which he is daily subject,) this will not defeat the legacy. But if a testator devise all the furniture at his house in A., such a devise will not pass furniture intended to be, but not yet actually, placed in the house at A., even though such goods were already packed up and ordered to be carried thither; which was the point in the Duke of Beaufort's case. (*a*)

Household furniture and plate, &c.

As a general rule, though admitting of some qualifications, it may safely be premised that by a devise of household goods *plate* will pass; (*b*) though not by a devise of utensils. (*c*) But a general bequest of furniture, goods, and chattels, by a silversmith, will not

(*x*) 1 P. Wms. 598.
(*y*) Plowd. Com. 343., and the cases there referred to in the Margin.
(*z*) 1 Ves. 271.
(*a*) 2 Vern. 739.
(*b*) 2 Vern. 572. 638. 1 P. Wms. 425. 2 P. Wms. 419. 3 Atk. 369.
(*c*) Dyer, 59.

carry the *plate* which constitutes a part of his stock in trade, but only the plate used in his house. (*d*) And the same doctrine has prevailed even in the case of a deed. Lord Hardwicke declared, in Crichton and Symes, (*e*) that the House of Lords were never clearer than in the case of Pratt *v.* Jackson; (*f*) that the word 'goods' related only to the household goods and furniture, and did not extend to the goods of the settler in the way of his trade, or his goods as a contractor for the Government. (*g*) We find also the same principle further adopted and confirmed in Le Farrant *v.* Spencer, (*h*) where the devise was of all the testator's household furniture, linen, plate, and apparel whatsoever. The Chancellor directed the case to be sent to a Master, to distinguish what goods the testator had for his domestic use, and what for trade and merchandise, without which, he said, it was impossible to determine the extent of the bequest, for it clearly included only the former.

Where a testator devises his furniture at or in certain houses named, such a devise will not carry a description of *plate* which the testator was in the constant habit of removing with him from house to house; for that could not be said to be the furniture of one house more than another; and it would seem that he meant only the particular furniture of each house. (*i*)

But under a bequest of plate, linen, &c. in S. Street together with the lease of the same house for the term therein to come at testator's death, though the plate and linen at the testator's death were at his counting-house, yet, having only one set of plate and linen, which was removed as the testator changed his place of

(*d*) 11 Ves. Jun. 666. (*e*) 3 Atk. 63.

(*f*) See 2 P. Wms. 302.

(*g*) See the note of the decision of the House of Lords, 3 Atk. 62. 3 Brown's Parliament. Cases, 199.

(*h*) 1 Ves. 97.

(*i*) See Equity Cases Abridg. Tit. Devises, (k).

residence; it was held that the plate passed as a general bequest. (*j*)

The word furniture carries plate commonly used, or intended for use, as may be presumed where suitable to the quality of the testator.

Under the Duchess of Bolton's will, (*k*) the import of the word '*furniture*' was largely discussed. The testatrix devised her household furniture and farming utensils, which should be within or upon the premises at her death, unto Charles Powlett. The Duchess died possessed of a great quantity of plate, which was worth about 1600*l.*; some useful and ornamental china, books, pictures, and linen, which were then at her house at Westcomb. The principal question was as to the plate. And his Honour premising that the word 'furniture,' unaccompanied by circumstances, was a word of very general meaning, and comprised every thing contributing to the convenience of the householder, or ornament of the house, adverted to the possibility of a restricted sense being put upon the word by a variety of circumstances which might attend the case. He denied that the question whether the plate would pass or not by the word *furniture*, depended upon the fact of its being in common use or not. If a person of rank buys a service of plate suitable to his quality, and never uses it, yet, he thought, the plate would pass by the word *household-furniture;* but that, if a tradesman had a dozen of silver-handled knives and forks, which he commonly used, and had besides a service of plate, which perhaps he bought as a good bargain, the service would not pass. Upon the whole of the case his Honour was of opinion that the *plate* did pass by the word *household-furniture*. He was also of opinion that the linen and china, (*l*) both useful and ornamental, as also the pictures, (*m*) both those which were hung up and others that were in cases, passed by the devise: but, in conformity to the decision in Bridgman *v.* Dove, (*n*) he

(*j*) Land *v.* Deveynes, 4 Bro. C. C. 539. Heseltine *v.* Heseltine, 3 Madd. 376.

(*k*) Ambl. 605. Sir G. Kelly *v.* Powlett.

(*l*) Hale *v.* Gilbert, 2 Ves. 430.

(*m*) Brown *v.* Cornforth, 2 Ves. 279. (*n*) 3 Atk. 202.

Furniture will not include books;

determined that the term *household-furniture* did not include *books*.

And we may add from the authority of Beck *v.* Rebon, (*o*) that under the bequest of 'a house,' neither pictures, nor other ornamental things therein as hangings, chimney glasses, &c. will pass.

In the case of Jesson *v.* Essington, (*p*) Lord Keeper Wright was of opinion that by a bequest of 'rings and household goods,' plate used in the house did not pass. But in Nichols *v.* Osborne, (*q*) it was distinctly held by Sir J. Jekyll, M. R. that plate in common use passed by a devise of household goods, and parol proof that the contrary was intended was rejected.

The opinion of the Master of the Rolls, Sir Thomas Clarke, in the above mentioned case of Kelly *v.* Powlett, appears to afford very just *criteria* for deciding this question under all circumstances; and subsequent cases seem mainly to have adopted his principle. (*r*)

It appears also that since the above mentioned cases of Kelly *v.* Powlett and Bridgeman *v.* Dove, it has been considered uniformly, that under the mere term household furniture, neither *books* nor wine pass to the legatee: (*s*) not even where the word 'furniture' has been connected with other things furnishing entertainment to the mind, as medals and pictures; and it seems that globes and mathematical instruments are equally out of the scope of the word 'furniture' in a will. (*t*)

Nor wine;

Nor globes, or mathematical instruments.

Under medals, coins, jewels, cabinet of curiosities, what are considered as passing.

Lord Hardwicke was of opinion that under the word *medals*, curious pieces of current coin kept with medals will pass as such. (*u*) But ornaments of the person,

(*o*) 1 P. Wms. 95. (*p*) Prec. in Ch. 207.

(*q*) 2 P. Wms. 418. and see Snelson *v.* Corbet, 3 Atk. 369.

(*r*) See Lillcott *v.* Compton, 2 Vern. 638. Masters *v.* Masters, 1 P. Wms. 425. and the late case of Porter *v.* Tournay, 3 Ves. Jun. 311. in which the authority of Kelly *v.* Powlett is fully recognized.

(*s*) 3 Ves. Jun. 311.

(*t*) Prec. in Ch. 207. note.

(*u*) Bridgman *v.* Dove, 3 Atk. 202.

as jewels, &c. will not pass by a bequest of a cabinet of curiosities; even though such ornaments may be kept together with the curiosities, and occasionally shewn with them. Thus, where E. C. in a codicil to her will made the following bequest: "I give to J. S. my collection or cabinet of curiosities, consisting of coins, medals, gems, and oriental stones, and other valuable things," the question was whether certain ornaments of the person were within the bequest. Evidence being read of persons in the trade as to the different sense of gems and jewels, that the latter meant stones set and prepared for wear, the former the same things when kept for curiosity only, the Lord Chancellor said, he took it that things to pass under the will in question must be *ejusdem generis* with those expressly devised; and that ear-rings, and other ornaments of the person, were part of the personal estate, and not specimens of natural curiosity. Had Mr. Pitt's diamond been in the cabinet as a specimen of natural curiosity, it must have passed to the devisee; and therefore he thought the proper line of distinction was whether they were prepared for wear, or not; and directed an enquiry to be made with respect to that circumstance. On the Master's report that they were occasionally worn, the cause came on before his Honour, sitting for the Lord Chancellor, who was of opinion that that circumstance made the difference. (*x*)

Live and dead stock.

Under the bequest of the use of a house with all the furniture, and stock of carriages and horses and other live and dead stock, to J.W. for life; it was held, agreeably to what has been above observed, that the plate did pass as being included under the word furniture; but that the wine did not. (*y*)

In Porter and Tournay, (*z*) it appeared to have been the opinion of the Master of the Rolls, that the words *live and dead stock* are of too ambiguous

(*x*) Cavendish *v.* Cavendish, 1 Bro. C. C. 468. S.C. 1 Cox 77.
(*y*) 3 Ves. Jun. 311.
(*z*) 3 Ves. Jun. 311.

an import to receive any certain construction; but that coupled with other words, they may receive a sense correspondent to those words. Thus if, after giving furniture, I give all my live and dead stock, I shall be held to mean in-doors stock, as wines, liquors, &c.; and if the word is coupled with what usually forms a part of the property *without* doors, then only such live and dead stock as are out of the house and about the premises *will* be considered as intended. In Porter and Tournay, the case just alluded to, the words 'live and dead stock' immediately followed the words 'stock of carriages and horses;' and, therefore, the Master of the Rolls, applied these words exclusively to the out-doors stock: adverting to the difference between that case, and Gower *v.* Gower; (*z*) in which the disposition was, of all other the testator's goods and chattels whatsoever which should be in and about his dwelling-house and out-houses.

A bequest of stock of cattle absolutely will pass all the cattle which the testator has at his decease; and such legacy will not be restricted by a subsequent bequest in the same will of the farm, and the stock and crop thereon. (*a*)

Standing corn.

Standing corn will pass under the description of stock of the farm. Thus where one devised a farm in his own occupation to his mother for life, remainder to G. in tail, and also devised to his mother all his goods and chattels, stock of his farm, bonds, &c., and all other his moveables whatsoever, and made her executrix; it was held that growing corn which was not reaped till after the death of the testator and of his mother, who died soon after him, passed to her representative, and not to G., the devisee of the land. (*b*) And in a subsequent case, where there was a similar disposition of the stock upon the testator's farm after a devise of the land in fee, the devise of the stock was held to carry the stand-

(*z*) Ambler, 612.

(*a*) Randall *v.* Russell, 3 Meriv. 190.

(*b*) Cox *v.* Godsalve, 6 East, 604. note.

ing crops of corn; although in that case the devise of such stock was to the executors to pay debts; and although there were assets sufficient to pay the debts and legacies without such part of the property. (*x*)

Stock in trade.

With respect to the words 'stock in trade,' what shall be comprehended in these terms must always in a great measure depend upon evidence of intention, intrinsically or extrinsically collected: but where there is nothing peculiar in the case to determine the import of the phrase, the popular and usual understanding of the words must govern their interpretation. Under a bequest of 'stock in trade' will clearly be included shop goods, and utensils of trade, and it has even been said that money in a till will pass under such a bequest.

It may also be a question of some difficulty what words will carry stock in trade, as well as what the words 'stock in trade' will carry.

In the case of Stuart *v.* Marquis of Bute, (*y*) where the testator gave all his waggon-ways, rails, staiths, and all implements, utensils and things, at his death used or employed together with, or in or for, the working, management, or employment of his collieries, and which might be deemed of the nature of personal estate, in trust to be held or enjoyed with the collieries, Lord Rosslyn decreed that under this bequest money due from the fitters and others, and in the Tyne Bank, coals at the pits, and staiths, corn, hay, horses, timber, oil, candles, fire engines, and other articles of stock in trade passed; which decree was affirmed on the rehearing by Lord Eldon. His Lordship however expressed considerable doubts; which doubts, it is conceived, related principally to the monies due from the fitters, and at the bank.

Where a man devised freehold and copyhold messuages, lands, and tenements, to A. for life, with re-

(*x*) West and Another, Executors of Moore, *v.* Moore, 8 East. 339.
(*y*) 11 Ves. Jun. 666. and see 1 Dow. P. C. 73.

mainder over, and afterwards the residue of his personal estate to B., and made B. executor; and part of the testator's estate consisted of a brewhouse and malt house, which together with the plant and utensils were then in lease; it was held that the plant passed to the devisee; for without the plant the walls could be of no use, and it was material that they were in lease together. The testator must therefore have meant to devise them both together. (*a*)

Stock in the public funds.

The questions arising upon bequests of stock in the public funds are very numerous and branching. But in a treatise like the present, intended for general use, it will be expedient to confine the consideration of the subject to clear and practical distinctions.

The topic of most frequent discussion on this subject is whether the legacy is to be regarded as specific or general. In the case of Purse *v.* Snaplin, (*b*) Lord Hardwicke states a specific legacy to be a bequest of a particular chattel, specifically described, and distinguished from all other things of the same kind; which may in other words, as Mr. Coxe observes, (*c*) be stiled an individual legacy. (1) But Courts have been led to the construction of bequests of specific legacies by other indicia. Thus in Jeffreys *v.* Jeffreys, afterwards decided by the same great equity Judge, the testator having at the time of making his will just so much stock as would exactly answer the two legacies which he thereby bequeathed, they were both held to be specific. In the case of Purse *v.* Snaplin, before al-

(*a*) Wood *v.* Gaynon, Ambl. 395.
(*b*) 1 Atk. 414.
(*c*) See his note to Hinton *v.* Pinke, 1 P. Wms. 538.

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(1) Thus money, though only a measure of value or amount in specie, may become an individual legacy when it is designated as being in a particular place, as in such a drawer or bag. See 1 Atk. 508. Ambl. 57. Stock does not pass under the word money.

luded to, the testator gave two legacies of 5000*l.* in the old South Sea annuity stock of the S. S. Company, to two persons respectively; and at the time of making his will and at his death he had only 5000*l.* in old S. S. stock. Lord Hardwicke considered these bequests as entitling the legatees to have them made good out of the testator's general assets; and the principle upon which the case was determined was this—that the testator had not so specifically described the subjects of the legacies as to distinguish them from all other things of the same kind.

In Ashton *v.* Ashton (*d*) there were no words of more specific import than in Purse *v.* Snaplin, above cited; neither did the stock of which the testator was actually possessed correspond in amount with the stock devised. The testator devised 6000*l.* S. S. annuities to be sold and laid out in land, to be settled as therein directed, and died possessed of large personal estate, but had only 5360*l.* in S. S. annuities. Lord Talbot, nevertheless, held the legacy to be specific, and not of quantity merely. But the late Mr. Serjeant Williams, to whose learned labours we are indebted for the last Edition of Lord Talbot's decisions, has observed, in a note to this case, that "it seems to have been determined upon the testator's directing the 6000*l.* S. S. annuities to be sold, and the produce thereof to be laid out in a purchase of lands, which strongly implied that the testator only intended to give the S. S. annuities which he was possessed of; and that he did not mean to have additional annuities purchased, in order to be sold out again presently afterwards:"—a remark of which Lord Hardwicke, and not the learned editor, who seems to have forgotten whence he took it, should have the credit. (*e*)

In the Second Volume of Domat. 159. it is laid down that when a testator bequeaths a certain thing, which

(*d*) Cas. temp. Talb. 152. (*e*) See 1 Atk. 418.

he specifies as being *his own*, the legacy will not have effect, unless that thing be found extant in the succession. "As if I bequeath to such a one *my* watch, or *my* diamond ring, and there be not found, after my death, any diamond ring or watch among my effects, the legacy will be null." There are cases in our books to the same effect, It is true, that Lord Hardwicke, in the case of Avelyn *v.* Ward, (*f*) seemed to consider that too much weight had been given to the word *my*; and that to rely on it entirely was allowing it too much importance; yet, in a subsequent case of Sleech *v.* Torrington, (*g*) we find Sir Thomas Clarke, whose opinions and reasonings on the construction of wills are always entitled to great respect, remarking, that it was very material as a circumstance in that case, that no pronoun possessive was added to the description of the annuities. So in the case of Ashburnham *v.* Macguire, (*h*) where the words were "*my* 1000*l.* East India stock," Lord Thurlow laid considerable stress upon the pronoun *my*; and observed, that it had been relied on in many cases in deciding the legacy to be specific.

The general rule is, that a bequest of so much stock is a general legacy, unless there is some special ground for construing it specific.

The general rule, however, appears by the result of the cases to be this, that the bequest of stock in the funds is to be regarded as expressive of quantity in general, and not confined to a particular sum of which the testator may be possessed at the time of making his will, or of his death, unless there is some word, phrase, or constructive ground, in the will, leading to such restrictive interpretation. Thus, where a testator bequeaths the sum of 1200*l.* of his funded property to T. S., and the residue of his property to B., this is a general pecuniary legacy to be answered out of the whole personal estate. (*i*) A bequest of so much stock in such a fund, in general terms, is a direc-

(*f*) 1 Ves. 425. (*g*) 2 Ves. 560.
(*h*) 2 Bro. C. C. 108.
(*i*) See Lambert *v.* Lambert, 11 Ves. Jun. 607.

tion to the executor to procure so much stock for the legatee. This was expressly said by Lord Chancellor Talbot in the case of Partridge *v.* Partridge, (*k*) in which case a testator devised 1000*l.* capital South Sea Stock to B.; and it appeared that at the time of making his will he had 1800*l.* of such stock, and afterwards, by sale, he reduced it to 200*l.*, which he afterwards increased to 1600*l.*, and died; the alteration of the stock was held to work no ademption.

It is observable, however, that in that case Lord Talbot is stated to have said, that if the testator, after such a legacy, sells out part, and dies, such sale will be an ademption *pro tanto;* which opinion seems to be at variance with the principle of the case; for if the bequest is to be regarded as a gift of quantity only, and not of a specific thing, and if it be law that where a testator bequeaths so much stock, having none such at the time of his devise, the bequest is to operate as a direction to the executor to procure so much,—why should the removal of the stock, or the diminution of it in specie, affect the substance of the bounty? On this point, therefore, perhaps, the case of Bronsden *v.* Winter (*l*) has proceeded with greater consistency. There the testator devised the sum of 2000*l.* South Sea Stock, and at the time of making his will had just that amount of such stock; he afterwards sold 1500*l.* of it; and Verney, Master of the Rolls, held this to be no partial ademption of the legacy, but decreed the 2000*l.* stock to be made good out of the testator's personal estate.

In both these last mentioned cases, the Act of Parliament for changing three-fourths of the capital South Sea Stock into annuities had taken place between the time of making the will and the death: but it followed, *a fortiori,* from the principles on which other parts of the case were decided, that such parliamentary change could work no ademption.

(*k*) Cas. temp. Talbot, 226. (*l*) Ambl. 57.

There can be no doubt, however, that in these points, as in most that regard the construction of wills, the intention of the testator is to be the guide; and this intention is to be collected from the general tenor of the instrument rather than from particular words or phrases.

Thus in the late case of Hotham *v.* Sutton, (*m*) the intention, though in some degree proceeding upon a mistake as to the fact, was the ground of the Chancellor's judgment. In that case, the testatrix, reciting that she was possessed of 12,700*l.* 3 *per cent.* Bank Annuities, standing in her name, gave and bequeathed the same, or so much of such Bank Annuities as should be standing in her name and at her death. At the date of her will, and at her death, she had near 15,000*l.* in that fund, besides other stock. Here the recital of the will, though erroneous, was considered as comprising the reason of the disposition, it was the measure of her bounty; the determination, therefore, was, that the bequest operated only on the sum mentioned in the recital, and that the excess of 3 per cent. Consol. Bank Annuities beyond the amount of 12,700*l.* passed under the residuary clause.

And where a testatrix, being possessed of 6000*l.* 4 per cent. Consols, made several bequests to the amount of 3200*l.*, and by a codicil, after reciting that she had given away 5600*l.* 4 per cent. Consols, gave the remaining 400*l.* to A.; A. was held to be entitled to the whole residue; it being probable that the testatrix considered, that the various legacies which she had given would, on the sale of her stock, be equivalent to 5600*l.* 4 per cent. Consols, and that the testatrix meant to give to A. the residue, the amount being stated not to limit the quantum, but merely as a description of the residue. (*n*)

If a testator mistake the fund, a bequest of his stock will pass his funded property, provided there was no stock of the description named belonging to the testator

(*m*) 15 Ves. Jun. 319.

(*n*) Dawes *v.* Manning, 1 Cox. 203.

at the time of his making his will. (*y*) And stock standing in the names of trustees will pass by a bequest of stock standing in the testator's own name, if he has no stock standing in his own name at the date of the will, or at his death. (*z*) And where a testator reciting that his daughter was entitled to some sums of money equal to 6,500*l.* gave her 3,500*l.* to make up 10,000*l.*, which he declared he designed for her fortune; the daughter being entitled to 5,500*l.* only: it was held that the testator meant that his daughter should have 10,000*l.*; and it was decreed that the deficiency should be made up from his estate, because legacies given as provision for children were to be construed liberally. (*a*)

Under a bequest of "all debts" to a debtor, the debts due at the date of the will only will be released, or discharged, and not such as were contracted since the testator's will, unless the same should have been republished. (*b*) But an error of description will not intercept the intended bounty; as, if a debt is bequeathed as a sum of "250*l.* due from A. on bond, the same being partly on bond, partly secured by covenant, and partly due in the capacity of executor, yet it was held that the full amount of the debt passed. (*c*) Under a bequest of money "due on mortgage" only the principal passes. (*d*)

A bond for securing the retransfer of stock has been held to pass under the description of "all debts," (*e*) and judgments; (*f*) and even money at a banker's has, on the strength of certain inferences of intention afforded by the context, been considered as included under "debts." (*g*) But under the bequest of a debt

(*y*) Door *v.* Geary, 1 Ves. 255. Penticost *v.* Ley, 2 Jac. and Walk. 207.

(*z*) Hewson *v.* Reed, 5 Madd. 451.

(*a*) Milner *v.* Milner, 1 Ves. 107.

(*b*) Smallman *v.* Goolden, 1 Cox 329.

(*c*) Williams *v.* Williams, 2 Bro. C. C. 88.

(*d*) Roberts *v.* Kuffen, 2 Atk. 113.

(*e*) Essington *v.* Vastion, 3 Meriv. 432.

(*f*) Stenhouse *v.* Mitchell, 11 Ves. Jun. 352.

(*g*) Carr *v.* Carr, 1 Meriv. 541 n.

which shall be "due from A. to me on a specific day," the debt must be taken as due on that day; and the legacy will not be altered by consignments made previous to the day mentioned. (*h*) And if a testator bequeaths what is due to him at his death, the legatee will be entitled only to what is due to the testator after his own debts are paid, though the residue should be bequeathed subject to the testator's debts, and other legacies. (*i*) A bequest of "all my money in the Bank of England" has been held to pass stock in the public funds; the testator never having had any money in the Bank. (*k*) And stock will pass under a bequest of securities. (*l*)

But generally the bequest of money will not pass stock in the public funds. (*m*)

Of qualified and temporary interests in chattels.

This seems a proper place to introduce some observations on those bequests of chattels which create qualified and temporary interests in them, followed by gifts over to others in succession. In the consideration of which subject, it should be distinctly understood that a strict legal remainder can only be limited of freehold estates. Every bequest of personal estate to take effect *in futuro*, whether it be after a preceding bequest or not, or limited on a certain or uncertain event, takes effect only as an executory bequest; and is subject to the rules and restrictions affecting that class of testamentary dispositions.

At common law no remainder of personal estate could in strictness be limited.

At common law, if a personal estate was bequeathed to one for life, or otherwise, and after the decease of the devisee or legatee, or on the happening of any other event, certain or uncertain, the same was given over to another, such limitation over was void; and the whole, in strictness of construction, vested in the first taker.

(*h*) Jones *v.* Mitchell, 6 Ves. Jun. 463.

(*i*) Dicks *v.* Lambert, 4 Ves. Jun. 725.

(*k*) Vulliamy *v.* Noble, 3 Meriv. 601.

(*l*) Reed *v.* Addison, 4 Ves. Jun. 525. Joy *v.* Campbell, 1 Sch. and Lef. 339.

(*m*) Hotham *v.* Sutton, 15 Ves. Jun. 319. and see Ommaney *v.* Butcher, 1 Turn. 260.

To avoid this inconvenience, and the disappointment of the testator's intention, a difference was made between the bequest of the *use* of a thing, and of the thing itself. (*m*) All difficulty, however, on this subject has long ceased to exist; and these limitations or gifts of ulterior interests in personal estate have for some centuries had their full operation as executory devises, or rather *bequests*. Thus, where a term is given to one for his life, remainder to another after his decease, this limitation is considered as not meant to take effect as a remainder, but, upon the principle of *ut res magis valeat quam pereat,* such limitation or gift over is regarded as a substantive devise to take effect upon the death of the person first named, or other event, certain or uncertain, and is considered as preceding the intermediate disposition: so that it is the same as devising a chattel interest in land to one man upon his paying a sum of money to executors, or upon the death of another, which makes it a proper executory devise; and after limiting which future interest, the testator is still at liberty to dispose of the estate in the mean time. Thus in Lampett's case in Cooke's Reports, (*n*) where a testator, being possessed of a messuage for a term of years, devised the same to his father for the term of his natural life, remainder, after his father's decease, to his sister and the heir of her body, it was resolved that the limitation to the sister was good as an executory devise. And in other cases where the ulterior disposition has depended upon an uncertain event, or been made in favour of a person not in being at the time, it has been supported upon the same principle. (*o*)

The doctrine above attempted to be explained is equally applicable to mere *bona mobilia,* in courts of equity. It has long been settled, that a bequest of goods to A. for life, with remainder after his decease to B., is a good bequest to B.; who formerly might file his

(*m*) Bro. Dev. pl. 13. Cro. Ca. 341.
(*n*) 10 Rep. 46. See also 8 Rep. 95. Matthew Manning's case.
(*o*) See 1 Roll. Abr. 612. 1 And. 60, 61.

bill against the legatee for life, to compel him to give security for the goods being forthcoming at his death: (p) but the later practice is, for the devisee for life to be required to sign an inventory, to be deposited with the Master for the benefit of all parties, which Lord Thurlow has observed to be more equal justice, as there ought to be existing danger to justify the requisition of a security. (q)

Of the dominion accompanying the interest for life in a personal chattel.

Very little is to be found in the books respecting the extent of enjoyment or dominion acquired by the person taking under a will the estate or interest for life in a personal chattel. In one case (r) it was held, that a devise from a husband to his wife of the use of household goods, furniture, plate, jewels, linen, &c. for life or widowhood, and afterwards to children and grandchildren, included an authority for the wife to use the goods in her own, or in any other person's house, alone or promiscuously with other goods, or even to let them out to hire. Mr. Fearne has observed, in treating incidentally on this point, (s) that in Marshall v. Blew it did not appear that the goods and furniture were annexed as heir-looms, to go along or be enjoyed with any house: but that such an annexation of them to the possession of any particular dwelling-house might probably have excluded the liberty of using them, or letting them to hire, *separately*, or otherwise than with the house on which the limitation of the goods was so attendant. Mr. Fearne, however, was of opinion that even where the furniture was directed to go with the house in the nature of heir-looms, it would be competent to the person having the life interest, to let such furniture together with the house, grounding himself, in some measure, on the case of Cadogan v. Kennett, (t) where, though the possession of the goods was connected with the house under the trusts, and a particular of them

(p) See 2 Freem. 206. 1 P. Wms. 1.
(q) 1 Bro. C. R. 279. 3 P. Wms. 336. 2 Atk. 82, 321.
(r) Marshall v. Blew, 2 Atk. 217.
(s) See Ex. Dev. 6th Ed. by Butler, 407. (t) Cowp. 432.

was annexed by way of schedule to the settlement, yet it was admitted that the husband who took an interest under the trusts in the same for his life, might have let the house and furniture together.

As to consumable things.

There are many subjects of testamentary disposition of which it may be said *usu consumuntur;* and where such are bequeathed to a legatee with a particular interest in them, as for his life only, some other person being appointed to succeed him in the property, many niceties and distinctions may arise in reference to the nature of the thing given. Where things are at once unproductive and consumable, the use of them implies the destruction of them; and this will always be the case with consumable dead stock: but, in respect to live stock, it is observable that though the individual thing is destroyed, the species still continues to exist, and the race is continually propagating. It may therefore be a question whether the legatee for life be not bound to keep up the stock for the benefit of his successor in interest, subject to the reasonable use and consumption of the produce. In the above cited case of Porter *v.* Tournay, (*u*) it was observed by the Master of the Rolls that "there had been great doubt among the judges, what a person having a limited use of such articles may do. Some learned judges had thought they must be sold, and that a person so entitled was to have only the interest of the money produced by the sale: but that was a very rigid construction." I am not aware of any more recent decision whereby these peculiar difficulties have been removed. One should certainly advise a person claiming such determinable interest, to govern himself by the fair and equitable principle of taking only a reasonable and proportionate use and enjoyment, and preserving the thing bequeathed, as far as might be consistent therewith, for the benefit of his successor under the will; in all cases ascertaining the quantity, number, and kind, by a proper inventory or account.

(*u*) 3 Ves. Jun. 311.

As to the remedies for preserving the goods to the persons in the succession.

Where, by the dispositions of a will or settlement, the possession of furniture and household goods are annexed, in the nature of heir-looms, to the possession of the mansion itself, such goods will not be suffered to be separated from the house by an execution against a person taking an estate for life under such will or settlement. If such will or settlement has vested in trustees the legal estate in the house and goods so settled together, the legal remedy will reside with such trustees for enforcing restitution, or recovering the value; and thus in the case of Cadogan *v.* Kennett, above cited, upon an action of trover brought by the trustees to whom the *possessio legalis* belonged, for the benefit of the husband and wife and the sons of the marriage in succession, Lord Mansfield observed that it was a settlement very common in great families: in wills of great estates nothing was so frequent as devises of part of the personal estate to go as heir-looms. So in marriage settlements it was very common for libraries and plate to be so settled, and for chattels and leases to go along with the land. If the husband grew extravagant, there never was an idea that these could afterwards be overturned: if that Court were to determine they should, the parties would resort to Chancery. It was the business of the trustees to see that the goods were not removed; the creditors had no right to take the goods themselves; the possession of them belonged to the trustees: the absolute property of them was then vested in the eldest son; and they were to be kept in the house for his benefit. (2)"

In the case of Foley et al. *v.* Burnell, (*x*) Lord Foley had devised his house called F. to trustees for a term

(*x*) Cowp. Rep. 435 n.

(2) The question whether that settlement was or was not void as against creditors, under the statute against voluntary and fraudulent conveyances, was a branch of the case, which, though of considerable interest, is not connected with our present inquiry; and has been discussed at large in the Treatise on Voluntary and Fraudulent Conveyances, by the Author of this Work.

of 99 years, and subject thereto, to his son T. for life, remainder to his first and other sons, with remainder over; and bequeathed "all the standards, fixtures, household goods, implements of household furniture and pictures, gold and silver plate, china, porcelain, &c. which should be in the several capital messuages, called S. W. and F. to be held and enjoyed by the several persons, who from time to time should successively and respectively be entitled to the use and possession of the same houses respectively, as and in the nature of heir-looms, to be annexed to and go along with such houses respectively for ever." Upon the testator's decease the trustees, who were also executors of the will, permitted the eldest son to occupy the house called F., and to use the wine, linen, and china which was in it at the death of the testator. Upon those articles being taken in execution at the suit of a creditor of the son, the trustees and executors, after having demanded them, brought an action of trover, and had a verdict for the amount of the articles so taken in execution.

Mr. Fearne in his comments on this last mentioned case, with his usual sagacity, suggests a doubt whether, as the property comprised in the heir-loom clause was not in this case devised to the trustees, but seemed only to have vested in them as executors, their consent to the possession by the first *cestui que trust* as legatee thereof, did not divest them of the legal estate, and pass it to the legatees under that clause according to their respective interests under the will, and so qualify them for the recovery of the goods by legal process. The same writer, however, was of opinion that if the legal remedy had failed on that ground, the legatees might still have found a resource in Equity. And he conceived himself to be supported in that opinion by the arguments of the Court in another case under the same will, in which the legal estate and interest in the chattels devised was clearly in the first taker. (*y*)

(*y*) Foley *v.* Burnell *et al.* 1 Bro. C. Rep. 274.

The Lord Chancellor, in considering the relief in the case last adverted to, put the case of a bequest of a chattel interest to one for life, remainder to another in tail; in which, he said, the ulterior devisee might come to the Court to prevent the destruction of the subject. Which case, Mr. Fearne observes, as well as the common instance of trustees for preserving contingent remainders being allowed to maintain an injunction from waste against tenant for life of the legal estate, seems to warrant the interposition of the Court, for the benefit of the persons entitled, after a temporary antecedent interest in the first taker, notwithstanding the interest of such first taker be clothed with the legal estate.

But it appeared to Mr. Fearne, to be a very sufficient ground for the equitable relief, that executory dispositions of *chattels personal* appear to have been originally founded in, and still to rest on the doctrine of Courts of Equity; and that if so, there could be no obstacle to the interference of those Courts in the regulation of interests, created by, and dependent upon, their own jurisdiction.

In chattels *real* the law has long admitted a division of the interest between the devisee for life, and those in remainder: but the division of the interest in chattels personal between tenant for life, and those to whom they are limited over, seems yet to be matter of equitable cognizance, resting upon the execution of a Court of Equity in specie. And such a specific apportionment and execution of the rights of the parties would be frustrated if the Court could not secure the specific chattels themselves, in the mean time, against such a disposition of the first taker, and all claiming through or under him, as would endanger its existence or preservation.

SECT. II.

As to Immoveable Things.

Leaseholds not, in general, included under a general devise of lands.

IT is a general and established proposition that where a man is possessed of freehold and leasehold property, the leasehold will not pass by a general devise, applicable to freeholds, unless an intention to include leaseholds under those words can be collected from the face of the will, or from the nature or situation of the leaseholds themselves. The great and fundamental case upon this subject is Rose *v.* Bartlett, (*z*) determined so long ago as the beginning of the reign of Charles I. It was there resolved that if a man have lands in fee, and lands for years, and devise all his lands and tenements, the fee-simple lands pass only, and not the leases for years: but if a man have a lease for years, and no fee-simple, and devise all his lands and tenements, the lease for years passes; for otherwise the will would be merely void. The rule has prevailed notwithstanding some expressions have been used by a testator which might seem to have been adopted on account of their applicability to chattel interests. Thus in the case of Davis *v.* Gibbs, (*a*) where the words were "manors, messuages, lands, tenements, hereditaments, and real estates whatsoever, of which I am any ways seised or entitled to," the rule laid down in Rose *v.* Bartlett was adhered to. And the same point was decided in the same way by Lord Mansfield in Pistol on dem. Randal *v.* Richardson, (*b*) in which the testator devised "all and every of his several lands, messuages, tenements, and hereditaments whatsoever and wheresoever whereof he was seised, and *interested in*, or *entitled to*, to his son for life, remainder to the heirs of his body; and afterwards devised his personal estate to his wife

But if the testator leaves none but leaseholds to answer the disposition, they will pass.

(*z*) Cro. Car. 292.
(*a*) Fitzg. 116. 3 P. Wms. 26.
(*b*) 1 H. Bl. 26. note.

and daughter, and made his wife sole executrix. The question was, whether the leasehold lands by the above words of the will were given to the son, or were part of the personal estate. After two arguments Lord Mansfield delivered the opinion of the Court, "that the leasehold lands did not pass to the son, but were part of the personal estate. (1) The case of Addis *v.* Clement, (*e*) indeed, which was decided the other way,

(*c*) 2 P. Wms. 455.

If the will is ineffectual to pass freehold for want of due execution, this will not make the leaseholds pass by a general devise, applicable to freehold estate.

(1) If a man, having both freeholds and leaseholds, devise all his lands and tenements, by a will unattested as the statute directs, so that it is inoperative in respect to the freeholds, still the words of the devise will not pass the leaseholds. This was one of the points in Chapman *v.* Hart,* determined by Lord Hardwicke, where a testator devised all his lands at or near Fowey to the plaintiff, and the will was executed in the presence of two witnesses only. The Chancellor observed, that it was not certain whether the testator had any leasehold in or near Fowey. If there should appear to be both, and the law had been with the plaintiff, so that she should be entitled thereto, it would be a ground for the direction of an enquiry; for the answer was not a positive negation of any leasehold. But if, let the fact come out how it would, the law was against the plaintiff, he ought not to direct an enquiry. And he was of opinion, that though it should appear that the testator had leasehold as well as freehold, the plaintiff would not be entitled. His Lordship supposed a case of a person seised of freehold and copyhold in D. who surrendered to the use of his will,† and devised all his lands and tenements in D. to his child; there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of Frauds: but if no surrender to the use of the will, only the freehold would pass; to which lands and tenements generally mentioned should be applied; there being no surrender to the use of the will, to shew a different intent. Suppose that will executed in the presence of two witnesses, or of one only; those general words used: and no surrender: though this were to a child or wife, the Court would not supply the defect of the surrender to the use of the will, or compel the heir at law to surrender the copyhold to the devisee, because the will was not duly executed; when, if duly executed, the Court would not have supplied that defect; for such variation of the construction would be very dangerous.

* 1 Ves. 271. and see Streatfield *v.* Streatfield, Talb. 175.

† Devises of copyhold are now effectual without any previous surrender to the uses thereof by virtue of the statute 55 Geo. 3. c. 192.

expressly proceeded in part on the effect of the words "whereof he, the testator, was seised or possessed, or interested in;" and it was lamented by Lord Kenyon, in Lane *v.* Lord Stanhope, (*d*) that that case was not cited in Pistol *v.* Richardson, since his Lordship thought that if Lord Mansfield had had it in his view, he might have been induced to decide otherwise than he did. But it seems from a MS. note of Pistol *v.* Richardson that the case of Turner *v.* Husler, (*e*) which proceeded on the authority of Addis *v.* Clement, was noticed by Lord Mansfield in his judgment, who received his account of it from Mr. Baron Eyre. (*f*)

Lord Eldon, in the case of Thompson *v.* Lady Lawley and Others, (*g*) seemed evidently to think that too much stress might be laid upon these words, "possessed of, or entitled unto." But his Lordship took notice of the other ground of the decision in Addis *v.* Clement, *viz.* that the twenty-one years' lease in that case was held of the church, and always renewable, so that the lessee, who was the testator, might look upon himself, from the right he had to renew, as having a perpetual estate therein,—a kind of inheritance; and appeared to think that an ingredient which sufficiently distinguished the case from Pistol *v.* Richardson.

Leaseholds will pass where there are only such to answer the devise, though the devise is expressly of the testator's freeholds.

The distinction taken in Rose *v.* Bartlet as to the effect of a will devising "lands and tenements" upon leasehold property, where there are no freeholds to satisfy the words, was fully confirmed by the case of Day *v.* Trig, (*h*) where, upon a devise by a testator, of all his *freehold* houses in Aldersgate-street, to the plaintiff and his heirs, he having in fact no freehold houses, but only leasehold houses, in the place described; it was decreed by Mr. J. Tracey, sitting for the Lord Chancellor, that, though in a *grant* of all one's freehold houses, leasehold houses could not pass; and though even in the

(*d*) 6 T. R. 353.
(*e*) 1 Bro. C. C. 78.
(*f*) See 2 Bos. and Pull. 309.
(*g*) 2 Bos. and Pull. 303.
(*h*) 1 P. Wms. 286.

case of a *wife*, had there been any freehold houses to satisfy the words, leasehold houses should not have passed; yet the plain intention being to pass some houses, and he having no *freehold* houses in the place mentioned, the word *freehold* should rather be rejected than the will be wholly void, and he decreed that the leasehold should pass. (2)

And where a testator, having both estates of inheritance and leaseholds in the county of Cumberland, by will gave all his manors, lands, tenements, mines of coal and lead, rents and hereditaments whatsoever in Cumberland to I. L. in tail; and reciting that he was owner of several burgage tenures in Cockermouth; declared it to be his will, that they should not be entailed, as he had done his other *estates* in Cumberland, and thereupon he devised them to Sir W. L. and his heirs; Lord Keeper Henley declared that both the freeholds and the *leaseholds* passed to I. L., observing that it was plain from the clause excepting burgage tenures, that the testator thought he had entailed the leaseholds upon I. L., the word *estates* being a general term, and comprehending both freehold and leasehold. He remarked also, that there were words inserted which were material to pass leaseholds, as mines and rents, which it would be strange to suppose him to devise, without the lands of which they were the profits, and from whence they flowed. (*i*)

In another case, a testator devised and bequeathed all his messuages, lands, tenements, and hereditaments whatsoever and wheresoever, and all his monies in the funds, to trustees, their heirs, executors, administrators, and assigns, *according to the several estates and interests*

(*i*) Sir James Lowther *v.* Lord Charles Cavendish, Ambl. 356. 1 Eden's Rep. 99.

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(2) He observed also that the suit was proper in equity, since the leasehold houses (being chattels) could not pass by the will without the assent of the executor, which assent he was compellable to give in equity.

therein, and devised the trusts of the rents, issues, and profits, dividends, interests, and proceeds, to pay legacies, and the residue of the said rents, &c. subject to ground rents, and other outgoings, in respect of his said messuages, &c. to his daughter A. H. for life. And at her death he devised and bequeathed all his said messuages, &c. and all his estate and interest therein, to the use of his grand-daughter, her heirs, executors, administrators, and assigns, subject to the proviso and declaration thereinafter mentioned; which proviso was, that in case his said grand-daughter should not have attained twenty-one, or be married at the decease of his daughter, the trustees should receive the rents for her use till her age or marriage; and he further willed that the *leasehold estates* should not be sold. Sir P. Arden, M. R. was clearly of opinion, that though the first words, 'messuages, &c.' would not pass leaseholds with freeholds, yet what followed was sufficient for that effect. (*k*)

And under an express devise of leasehold, freehold may pass, if such appear to be the intention.

As by the cases above cited it appears that the insertion of the word '*freehold*' by the testator will not prevent the passing of *leasehold* property, where the intention to pass the same is manifest upon the whole will; so it has been ruled in the Court of King's Bench, that under the phrase *personal* estates, real property may pass, if it is clear from the bearing of the instrument that such was the testator's intention. (*l*) And where by a will, giving the estate a local description and a name, the property was mistakingly called leasehold, the testator's freehold was held to pass, there being no other property answering the name and description. (*m*)

So, by the word legacy a devise of freeholds may be understood.

On the same principle of giving to words an effect commensurate with the clear intention of the parties, whatever may be their primary or strict sense, the

(*k*) Hartley *v.* Hurle, 5 Ves. Jun. 540.
(*l*) Doe on dem. of Tofield *v.* Tofield, 11 East, 246.
(*m*) Denn d. Wilkins *v.* Kemeys, 9 East. 366.

word 'legacy' has been construed as comprehending real estate. Thus, where A. by will gave two legacies of 150*l.* each to his son and daughter, to be paid at twenty-one, and then gave all his realty and personalty to his wife for life, and after her death, one freehold estate to the son, and another to the daughter; but if either or both his children should die before the wife, then those legacies which were left to them should return to the wife; it was held that on the death of the son before the mother, the mother was entitled to the reversion of the freehold estate, the word 'legacy' not being necessarily confined to the pecuniary bequests, where by the context of the will it appeared to have been used by the testator in a larger sense. (*m*)

Whether copyhold passes by the general devise of lands, &c.

Whether the general words 'messuages, lands, tenements, and hereditaments,' will pass copyhold as well as freehold estate, without any inference furnished by the will itself, of the testator's intention to include both, seems to rest in some doubt. In the case of Doe d. Belasyse *v.* the Earl of Lucan, (*n*) none of the judges appeared to hold any decided opinion on the point. That case, however, has completely established the doctrine, that wherever the intention of the testator to devise his copyhold can be collected from the will, and the words, though they make no mention of copyhold are large enough to comprehend it, and a proper surrender (*o*) has been made to the use of the testator's will, such copyhold will pass to the devisee. And we may safely infer from the principles of the last mentioned case, as well as from others, that where the testator's freehold will not satisfy the description, or the purposes expressed in the will, unless the copyhold be considered as included in the devise, the intention to devise the copyhold is sufficiently indicated.

(*m*) Hardacre and Another *v.* Nash and Another, 5 T. R. 716. and see Hope d. Brown *v.* Taylor, 1 Burr. 268.

(*n*) 9 East. 448,

(*o*) Not necessary since the stat. 45 Geo. 3. c. 192.

The case last adverted to was to the following effect. The testator, having a freehold manor of Sutton, and freehold lands there, and having also copyhold lands within the township of Sutton, and within the local ambit of the manor, but held of another manor, and having surrendered his copyhold to the use of his will devised all his manor of Sutton, and all his messuages, farms, lands, tenements, and hereditaments, whatsoever, within the precincts and territories of Sutton, in the county of Chester, with their rights, members, and appurtenances, in trust for his daughter, and to her children in strict settlement. And, first, it was held that farms, lands, &c. within the township, though not within the manor of Sutton, passed by the description of farms, lands, &c. within the precincts and territories of Sutton. Secondly, that the general words of 'messuages, farms, lands, and tenements,' and particularly the word 'farms' (3) were sufficient to carry copyhold as well as freehold in the place described, if such appeared to be the intent of the testator upon the whole will; and, thirdly, that such intent was to be inferred in the case before the Court, as it appeared that the testator had within the place described a farm composed of copyhold and freehold, which he had let as one entire subject, and also by his having charged the property devised beyond the annual income of it, unless the copyhold were included. It was held clearly, that another small copyhold at the distance of about eight miles from Sutton, and not in the same county, passed by the residuary clause, whereby the testator devised all the *rest, residue, and remainder, of his real* and personal estate. (*p*)

(*p*) See the case of Doe d. Pate *v.* Davy, Dougl. 716. note (2), and see the cases in 6 Vin. Abr. tit. Copyhold. 236, 7.

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(3) Lord Ellenborough observed that the word 'farms' at least would include copyhold as well as freehold.

Of the doctrines of equity on this subject.

The cases on this subject, which are of frequent occurrence in equity, have arisen upon the usual resort to that forum to supply the defect of a surrender, when such was a necessary preliminary, which it would only do for the sake of three descriptions of persons, (*q*) creditors, wife, and children: of which three classes the courts of equity shew the greatest favour to creditors; for neither the wife, nor younger child, were deemed entitled to have the defect of a surrender supplied for them, if the heir at law (being a child of the testator) would be thereby left unprovided for. If the will devised the copyhold in terms, and for the benefit of any of the above-mentioned favoured objects, equity would supply the want of a surrender, and give effect to the express intention of the testator: but where the words were general, as 'messuages, lands, tenements, and hereditaments,' and such surrender was wanting, the Court has for the most part shewn a reluctance to consider copyhold included in those words, without some ground of necessity for such construction. Thus in Hazlewood *v.* Pope, (*r*) Lord Chancellor Talbot held that "if a man devises all his lands, tenements, and hereditaments, in Dale, in trust to pay his debts and legacies, and the testator has some freehold and some copyhold lands there, only the freehold lands shall pass, for his will must be intended of such lands and tenements as are devisable in their nature. *Secus*, if the testator had surrendered his copyhold lands to the use of his will, because this shews he did intend to devise his copyhold. But even in the first case, *i. e.* where there has been no surrender to the use of his will, when the testator devises all his lands to pay his debts, it seems rather that the debts should go unpaid, than the copyhold shall in equity pass."

It is clear from the above expressions of the Chan-

(*q*) Goring *v.* Nash, 3 Atk. 189. Goodwin *v.* Goodwin, 1 Ves. 228. Byas *v.* Byas, 2 Ves. 164. Tudor *v.* Anson, 2 Ves. 582; and see Mr. Coxe's note to Watts *v.* Bullas, 1 P. Wms. 60.

(*r*) 3 P. Wms. 322.

cellor, that the difficulty lay in giving to the general words the effect of passing copyholds, without a strong necessity for such construction, where the copyhold had not been previously rendered devisable by a surrender to the use of the will; considering the fact of the omission or observance of this ceremony as being a strong circumstance of inference with respect to the testator's intention.

That this was likewise Lord Hardwicke's view of the subject may be collected from the case of Goodwyn *v.* Goodwyn, (*s*) where his Lordship observed, that it had been in several cases held that a devise in general words of all lands and tenements would not comprise copyhold lands, which had not been surrendered to the use of the will so as to shew an intent to comprise them. And where, continued the same Chancellor, the intention of the testator of raising portions or payment of debts may be answered by freehold lands, the Court will not suppose he intended to pass copyhold. In that case the copyhold had been surrendered to the use of the will, and the general words being considered as comprehensive enough to include them, it was adjudged to be included in the devise. His Lordship, in a case (*t*) which came before him a few months afterwards, adverted to the same doctrine in the following words. "Suppose a case, (which though I do not know to be determined, I should not doubt to determine so,) of a person seised of a freehold and copyhold in D. who surrenders to the use of his will, and devises all his lands and tenements in D. to a *child; there being a surrender,* both freehold and *copyhold* would pass: but if no surrender to the use of the will, only freehold would pass."

Whether the general words *lands, tenements,* and *hereditaments,* are alone sufficient to pass

It does not seem, therefore, that the courts formerly considered the general words *messuages, lands, tenements,* and *hereditaments,* of force *per se* to carry copyhold estate; and the reason appears to have been, that

(*s*) 1 Ves. 226. (*t*) Chapman *v.* Hart, 1 Ves. 272.

copyhold estate, without any special circumstances to indicate the intention.

copyholds being not in their own nature devisable, these general devising words were not, *prima facie*, applicable to them. But since the statute for dispensing with the surrender, this reasoning is of less, if of any, force. It was always considered that there must be something to manifest an intent to pass them. If, therefore, the surrender to the use of the will was wanting, and there was a general devise of the lands, &c. in favour of the testator's wife or child, equity, though disposed to supply the defect of the surrender in behalf of these favoured objects, could not see in these *general words* the intention to pass the copyhold at all, if there was any freehold estate to answer the words of the will.

But if the devise was for the purpose of paying debts, and the freehold was not enough to answer that highly favoured object, equity supplied the surrender in behalf of the intention inferred from the necessity of the case, though the devise was only in the general terms abovementioned. Still, however, it has been said that equity would supply the want of the surrender *so far only* as may appear *necessary* for the payment of debts; and, therefore, it has been held, that while any freehold estate remained applicable to that purpose, the want of the surrender of the copyhold should not be supplied.(*u*) And this has been even held to be so, notwithstanding the express intention of the testator to charge the copyhold rateably with, or in preference to, the freehold.

Where there was a surrender to the use of the will, such surrender appears to have been, in some instances, considered as at once opening a way for the copyhold into the will, and affording a ground for inferring an intention in the testator to pass it by his will; and having got so far, the only enquiry was, whether there were words in the will capable, in point of legal compass, of embracing copyhold estates, as doubtless the

(*u*) Mallabar *v.* Mallabar, Cas. temp. Talb. 78. Combes *v.* Gibson, 1 Bro. C. R. 273. Hellier *v.* Tarrant, Ca. temp. Talb. 3d edit. 288. (note).

general words 'lands, tenements, and hereditaments,' must be admitted to be.

This would have been giving great effect to the act of surrendering; and might, if it had been once so settled, have saved a great deal of trouble: but it seems as if it would be travelling faster than the cases to say that such was ever the clear and settled doctrine. In the case of Doe and Belasyse *v.* The Earl of Lucan, above stated, Lord Ellenborough said he should proceed merely on the testator's intention, as he collected it from the face of the will; saying he was afraid to look at any argument of intention to be derived from the surrender to the use of the will, though, perhaps, it might be proper to be regarded even in that Court, as it certainly would be in another court, but that it was not necessary for him to give any opinion upon that point; he professed to determine the case upon the intention as collected from the words of the will only.

Upon the whole it must be considered as resting in some uncertainty whether, and if at all, to what extent, the fact of a surrender to the use of the will ever afforded a sound inference of intention; and, supposing no special ground for inferring intention, whether the general words, "lands, tenements, and hereditaments," in a will, to the use whereof a surrender has been made, are of force *per se* to carry copyhold estate. The necessity of a surrender no longer exists; and as we may collect from the cases that where these words occurred in a devise, and a surrender of copyhold was previously made to the use of the will, the copyhold passed, if an intention to pass it could be collected from the context of the will; so now the same consequence would arise from the use of those descriptive denominations aided by inference from the context, in a will not preceded by a surrender.

Copyhold will pass customary estates.

The word *copyhold* is not always necessarily confined in a will to that which comes strictly within its meaning. Thus in a late case, (*x*) a customary estate, parcel

(*x*) Cook and Cook *v.* Danvers, 7 East. 299.

of a manor, demisable only by the licence of the lord, and passing by surrender and admittance, whether strictly copyhold or not, was adjudged to pass under the description of a copyhold in a will, the intention being apparent. (4) And, indeed, where the intention is apparent from the context of the will itself, the specific and technical meaning of the words needs scarcely any longer be a subject of enquiry, after the cases which have decided that legacy, or personal estate, may be descriptive of a real devise, or of real property, if it is clear that such was the meaning of the testator.

What words include a manor,

In the above-mentioned case of Haslewood *v.* Pope,(*y*) Lord Chancellor Talbot made a doubt, whether, if a man have lands, and also a *manor* in Dale, of which the lands are not parcel, a devise of the lands would include the manor: but he seemed clear that it would

(*y*) 3 P. Wms. 322.

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(4) But it should seem that upon a broader ground than any evidence of *particular intent* the word copyhold in a will ought to be considered as including customary estates held of a manor, and demised and demisable by copy of court roll, although not copyhold in the stricter sense. It is thus that Lord Ellenborough has expressed himself on the subject in the case of Roe and Conolly *v.* Vernon and Vyse, 5 East. 83, 84. "In disposing of their property testators usually advert to the known and ordinary circumstances attending it, and adopt the appellations by which it is generally and more familiarly distinguished. They cannot be supposed to regard or consider those equivocal or less obvious qualities of their estates, about the effect of which profound lawyers and legal antiquaries might entertain controversies. The distinction between estates which may be immediately transferred from man to man by deeds and instruments executed merely between the parties themselves, and those estates the titles to which are evidenced by copies of the rolls of the courts baron, are familiar to men the least acquainted with the rules of property: but the distinction, and still more the effect of the distinction, between tenants by copy of court roll at the will of the lord according to the custom of the manor, and tenants by copy of court roll simply according to such custom, as determining the one to have a freehold interest, and the other not, is a distinction not at all likely to occur to persons in general when disposing of their property."

pass under the word *hereditament,* and there can be as little doubt that the word *tenement* would embrace it.

And *advowson.*

The same may be said of an *advowson,* (5) which in Westfaling *v.* Westfaling (*z*) was clearly held to pass by the word *tenements* (*a*) or *hereditaments,* (*b*) but not by the word *lands.* But supposing the devise to have been of *lands* at a particular place, and that the testator had nothing but a manor, or an advowson, to answer the devise, rather than that the will should be inoperative, it seems to be the better opinion that the manor or the advowson would pass. (*c*) So in the case of Ritch *v.* Sanders, (*d*) where a testator gave all his free lands wheresoever to his brother John Sanders for life, upon condition that he suffered the testator's wife to enjoy all his free lands in Holford for life, the testator having only a portion of tithes of inheritance in Holford, and no lands, the word "lands" was held to extend to tithes, though an incorporeal hereditament, and collateral to the land.

Lands include *houses.*

But *lands, ex vi termini,* will pass *houses;* so that, if a man having both lands and houses in Dale, devise all

(*z*) 3 Atk. 460.
(*a*) Hob. 303.
(*b*) Dyer 323. pl. 30.
(*c*) Vid. 3 P. Wms. 322.
(*d*) Style 261.

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(5) It appears doubtful whether the word *advowson* will carry an impropriation of it. Hob. 304. But by the devise of an advowson the next turn or presentation inclusively passes, even though the devisor himself is the incumbent. 1 Atk. 619. And there is no doubt but that the next turn or presentation is a proper subject of devise, vid. Law *v.* Bishop of Lincoln, 2 Blackst. 1240., though if the presentation falls in the life of the testator, the devise must of necessity fail. Nor does it seem that after avoidance the right to present is strictly devisable, being in the nature of a chose in action. It is held, however, that if the incumbent is also the patron, he may devise the next turn or presentation; for although at the very instant of the death the church becomes void, yet the testament is regarded as having an inception in the lifetime, which secures its operation at the moment of the death. Harris *v.* Austin, 3 Bulst. 36. 1 Roll. Abr. 210. Cro. Jac. 371.

his lands in Dale, his houses will pass to the devisee. (*e*)

What passes by the word *manor*.

By the devise of a *manor*, the manor passes together with all the demesnes and services; so that if after such devise a copyhold, parcel of the manor, escheats to the lord, it undoubtedly passes by the will. (*f*) In strictness the soil and inheritance is in the lord, and the copyholder is only a tenant at will; so that under a devise of a manor, copyhold premises, parcel thereof, subsequently purchased by, and surrendered to, the lord, will pass. (*g*)

What passes under *farm*.

The word *farm*, as importing all such premises as have been usually let together, and comprehended within one entire holding, has always been considered as carrying the whole premises, where the same have consisted of different descriptions of estate; and this, although the word has been associated with other terms, descriptive in their ordinary sense of freehold property only, and the testator has died seised of freehold estate sufficient to satisfy the *primâ facie* import of the words. Thus, where A. being seised of several freehold estates, and possessed of part of a *farm*, held by a church lease, renewable, (the other part of the farm being freehold, and the whole having been always let together, as one entire farm, at one rent,) devised "all his manors, messuages, houses, *farms*, lands, woodlands, hereditaments, and real estates whatsoever," to B., and gave "all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate whatsoever" to C.; it was clearly held that the leasehold part of the farm passed under the first devise. (*h*)

Unity of possession is always a strong argument of intention to include the subjects so held together, under one and the same devise, even where the word *farm*

(*e*) Ewer *v.* Heydon, Moor 359. pl. 491. and see Godb. 352. pl. 447.

(*f*) Bunter *v.* Cooke, 11 Mod. 129. Salk. 238.

(*g*) Roe d. Hale *v.* Wegg and Others, 6 T. R. 708.

(*h*) Lane *v.* Earl Stanhope and Others, 6 T. R. 345.

does not occur in the will. As in the case of Roe d. Pye *v.* Bird, (*i*) where a testator devised all his estate in A. having copyhold and leasehold there which had been purchased together, and afterwards occupied together for twenty-three years; the devise was held to include both the leasehold and copyhold, as one consolidated estate, though there was in the same will, a bequest by the testator, of all his personal estate to another. And so, where a man devised his freehold and copyhold messuages, lands, and tenements to A.; under this devise the plant of a brewhouse was held to pass with the brewhouse itself, having been tenanted together, although there was a bequest of the personal estate to another. (*k*)

Thus also, in an earlier case, where a testatrix had devised to A. an entire *farm* in the occupation of one of her tenants, which included a small parcel of marsh lands; this parcel of marsh lands was held to pass, together with the *farm* to which it was attached, notwithstanding there was in the same will a devise of all the testatrix's marsh lands to another person, she having a large estate in marsh lands besides, which was let together to another tenant. (*l*)

Messuage—what it may include.

The word *messuage* has also been carried by construction to the same extent. Thus in a case where the testator devised his three messuages, with all houses, barns, stables, stalls, *et cætera*, that stand upon or belong to the said messuages, and the question was, whether the lands and meadows which were held with the messuages, would pass by the will; the Court, after saying that the intention of the testator was the polar star to direct them in the construction of wills, observed, that the testator had clearly manifested his intention to dispose of his whole estate, by the introductory words,

(*i*) 2 Blackst. 1301.

(*k*) Wood and Wife *v.* Gaynon and Wife and Others, Ambl. 395.

(*l*) Holdford d. Hitchcock *v.* Pardoe, 2 Blackst. 975. and see Doe d. Belasyse *v.* The Earl of Lucan, 9 East. 448.

which were, "As touching such worldly estate wherewith God hath blessed me, I give, &c." The Court also laid great stress upon the fact of the testator's having purchased the whole estate together, both messuages and lands, a short time before he made his will. —They thought it clear from all circumstances, that the lands and meadows, as well as the houses, were meant to pass by the devise, as one entire farm, as much as if the testator had said, "I give and devise all that my *farm*, with the appurtenances which I purchased of A. B." which, without doubt, would have passed the whole, both messuages and lands. (*m*)

A devise of all my messuages in T., and now in my occupation, where the testator had two messuages in T., of which he only occupied one, was *held* to pass only the one so occupied. (*n*)

House—what it may include.

Notwithstanding the different construction given to *messuage*, and *house*, in many of the early cases, the Court in the case of Doe d. Clements *v.* Collins, (*o*) seemed to think the distinction had been carried too far. There, A. being tenant for years, of a house, gardens, stables, and coal-pen, made the following bequest, "I give the house I live in, and garden, to B." And it was held that the stables and coal-pen occupied by A., together with the house, passed without being expressly named, though the testator used them for the purposes of trade, as well as for the convenience of the house.

But no case has gone so far as to say that the word *house* alone is capable of receiving from evidence of intention such an enlargement of its sense as to pass lands in a will. In the case of Doe d. Walker *v.* Walker, (*p*) the argument from intention was much pressed: but the Court considered that to supply the word "lands" would be to supply an absolute omission in the will, of which they said they never knew an in-

(*m*) Gulliver d. Jeffereys *v.* Poyntz, 3 Wils. 141. And see the cases collected in Hargrave's notes to Co. Litt. 5 b. note 21.

(*n*) Doe d. Parkin *v.* Parkin, 5 Taunt. 521.

(*o*) 2 T. R. 498.

(*p*) 3 Bos. and Pull. 375.

stance. The case was shortly this. A testator devised to his wife his house and goods, with all his lands, goods, and chattels whatsoever and wheresoever, for her life; and after her death to two younger sons, till they should attain the age of fifteen, for their education. He then devised his aforesaid house, goods, and chattels, equally to be divided between all his sons and daughters, share and share alike; and it was determined that under the last clause of the devise, the lands did not pass. There is a case, however, in Peere Williams, (*q*) in which, by force of the general intent deducible from the dispositions of the will, land was held to pass without any other descriptive word besides his (the testator's) *house* at C. The testator directed that his cousin, Anne Edgley, should continue to live at his house at C., and that her son H. E. should continue to live with her there in the same manner as he then did with the testator; that the said Anne Edgley should be at all the charge of house-keeping, servants' wages, and coach horses, to the number that he maintained. The testator was seised in fee of some little *land*, by him always employed for producing hay and corn which was constantly spent in the house, and the land was ploughed with the coach horses which the testator kept. Upon this will and these circumstances the Court reasoned that the intention of the testator was, that after his death, and during the life of his kinswoman Anne Edgley, every thing should be carried on and transacted as it was in his life-time, and that to such a nicety, as that the same number of servants, and even of coach horses, was to be employed, the same hospitality observed, and the same horses used in ploughing the lands; which could not be, unless the lands were to continue as before to be enjoyed with the house: therefore, as it seemed to have been his intention not to part with them, it was decreed that those lands which had before been constantly enjoyed with the house, and the profits whereof had been applied to

(*q*) Blackburn *v.* Edgley, 1 P. Wms. 600.

the maintenance of the house, should continue to be so enjoyed.

Of the effect of the word *appurtenances.*

There is less difficulty in construing land to pass with a house, where the word *appurtenances* is added. Thus in Doe d. Lampriere *v.* Martin, (*r*) land occupied with a house, and highly convenient for the use of it, was held to pass in a will by the word *appurtenances,* though the land in that case was held for a different term.

In the last cited case the devise was of "all the testator's copyhold messuages, with all out-houses, gardens, and *appurtenances* to the same belonging, situate at Fulham, and then in his possession." And the land in question was the site of some cottages, which the testator had lately pulled down for the purpose of taking the ground on which they stood into the court-yard of the house, so that his plain meaning was to unite these parcels together, and to devise all that he personally occupied.

From the reasoning of the case it appears, that the land was considered as included in the word *appurtenances,* for the sake of giving effect to the manifest intention of the testator, as it appeared by the context of the will itself, assisted and explained by extrinsic evidence; which seems to be a sufficient ground for extending the import of the word *appurtenances,* or any other word of description in a will. But it may be observed that that word in its strict technical sense has been held to extend to the buildings, curtilage, and garden, belonging to a house; and the court-yard seems to be part of the curtilage.

But *appurtenances* will not *ex vi termini* comprehend land, although usually occupied with a house; but only such land or ground as is immediately connected therewith, and necessary to the commodious enjoyment of it. If it is to be carried beyond this, so as to include lands, such extension of its sense must be a consequence of the principle of giving effect to the general plain intent

(*r*) 2 Blackst. 1148.

of the testator. Thus in Buck and Whalley *v.* Nurton, (*s*) the will contained the following clause: —"And it is my express will and desire, and I do hereby direct, that the said John Nurton shall hold and enjoy my said capital mansion-house, with the *appurtenances*, for the space of one year after my death." In another part of the same will the testator had devised "All that his capital mansion-house wherein he then lived, and the lands and grounds thereto belonging, and therewith held and enjoyed, with the *appurtenances*."

The testator was possessed of a mansion-house, together with several parcels of land, amounting to sixty-four acres; and there were also extensive gardens and pleasure-grounds, together with walks and ways attached to the house. The question was what parts of the premises passed to John Nurton by the clause which directed that he was to have the mansion-house with the appurtenances for a year after the testator's death. The ejectment was brought to recover sixty-four acres and a half of land, consisting of a park, meadow land, pasture land, and orchards, which were proved to have been constantly occupied by the testator for many years before his death in conjunction with the mansion-house. But the Court did not see sufficient evidence of intention in the case to justify them in giving to the word *appurtenances* an effect beyond its technical sense, notwithstanding the fact of the usual enjoyment of the lands in question together with the house. The word *appurtenances* was therefore confined to the gardens, pleasure-grounds, walks, and *orchards*; though, as to the orchards, Eyre, C. J. appeared to have some doubts.

Mortgages.

Under a bequest to A. of all the testator's mortgages, or of all the monies due to the testator on mortgage, the whole benefit will pass to the devisee; and if the mortgage be of lands in fee, or for a term only, the se-

(*s*) 1 Bos. and Pull. 53.

curity will pass with the thing secured; and the heir or executor, according to the nature of the security, will be a trustee for A., who will be permitted by the Court to use their names to obtain the money, or make the mortgaged estate his own by a foreclosure. (*t*) Where, indeed, a testator, by his words of disposition manifests an intention to give all his interest in the security and the money secured, there is good ground for holding the legal estate in the lands to pass, supposing the will to be duly executed. (*u*)

Where a testator couples with the word mortgages other words of less latitude, the import of his language may be limited by a narrower construction. Thus a testator, mortgagee in fee, after devising his own lands in other places, and bequeathing several legacies, gave all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods *whereof he was possessed*, to his wife, after debts and legacies paid, and made her executrix; the Court of K. B. held that the fee in the mortgaged premises did not pass to the wife, and doubted whether any estate in them at all passed to her; the other articles specified being of a personal nature, and the words added "whereof he was possessed" seeming to restrain the terms 'estates' and 'mortgages,' to estates and mortgages for years. (*x*) But whether the whole of that judgment can stand as an authority consistently with more modern determinations may perhaps be questionable.

The Judges indeed in the same case were all agreed that if the testator had mentioned that he had such land mortgaged in fee, and devised *his mortgage*, the fee would have passed.

Whether the estate mortgaged will pass under the

(*t*) Atty. Gen. *v.* Meyrick, 2 Ves. 44. *Per* Sir J. Strange, M. R.

(*u*) Silberschildt *v.* Schiott, 3 Ves. and B. 45. and see Crips *v.* Grisell, Cro. Car. 37.

(*x*) Wilkinson *v.* Merryland, Cro. Car. 447, 450.

will of the mortgagee by a mere devise of his "lands, tenements, and hereditaments," is a point to be stated in terms of caution and discrimination.

Whether the estate mortgaged passes by a devise of his "lands, tenements, and hereditaments."

L. being seised of several manors and lands, and also of mortgages in fee, which were forfeited, and of a great personal estate, having no issue, made his will, and after devising part to his wife for life, and other legacies, "gave all other his lands, tenements, and hereditaments, out of settlement to his nephew." And one of the questions in the case was: whether these mortgages passed by the will under the general words, "*lands, tenements, and hereditaments.*" It was held by the Lord Chancellor, the Master of the Rolls, and the two Chief Justices, (*y*) that the mortgages in fee, though forfeited when the will was made, did not pass by these general words. But the decree in that case, as it is stated in the Register's Book, B. 1707. fo. 501. takes no notice of any mortgages, except those whereof the testator, after making his will, had purchased the equity of redemption. The case of Winn *v.* Littleton affords a *particular* ground for construing the mortgaged lands out of the general words; and according to Reg. lib. 1680. fo. 452. the decree leaves it equivocal, whether the party directed to convey was devisee or heir.

Upon the whole there seems to be no good ground for holding mortgaged lands not to pass by the general words, uncontrouled in their effect by inference from the particular dispositions: but it is clear law, that the intent may restrain the generality of the language. (*z*) Where the devise is to executors, or trustees for paying debts, the intent is promoted by construing the mortgaged lands to pass. (*a*)

Under a bequest of "200*l.* secured by a mortgage on the estate of A. and all the messuages, lands, and te-

A bequest of principal will not pass arrears of interest.

(*y*) Sir Litton Strode *v.* Lady Russell *et al.* 2 Vern. 625.

(*z*) *Vid.* Co. Litt. ed. H. and B. 203. b. n. 96. *et vid.* Duke of Leeds *v.* Munday, 3 Ves. Jun. 348.

(*a*) *Vid. ex parte* Serison, 4 Ves. Jun. 147.

nements for securing the same," Lord Hardwicke, C.J. held that the principal only passed, and not any arrears of interest. (*b*) And the proposition may be reversed; for, under a bequest of the arrears of the testator's mortgage on a particular estate only, the interest already due will pass, but not the principal or the security itself. (*c*)

A bequest of arrears of interest will not pass the principal.

By a devise of the occupation, or of the *rents* and *profits*, the land itself passes.

It has long been settled that by a devise of the *occupation*, or of the *rents and profits* of the land, the land itself is carried to the devisee. Thus where the occupation was devised to the executor for a time, and afterwards the land itself to another, the executor's execution of the legacy to himself was adjudged to be an execution of it to the other, *both their interests being the same.* (*d*) A gift of the *rents and profits*, or of the occupation of the land, is considered as a mere circumlocution to express the thing itself. (7) But the books make a difference between the devise of the use or occupation of a personal chattel, and the devise of the occupation and profits of land or a chattel real. Thus in the Year-book, 37 H. 6. (8) the case was that A. being possessed of a book called the Grail, devised it to B. one of his executors, to have the occupation of

(*b*) Roberts *v.* Kuffin, 2 Atk. 113.

(*c*) Hamilton *v.* Lloyd, 2 Ves. Jun. 416.

(*d*) Welcden *v.* Elkington, Plowd 524. Paramour *v.* Yardley, Plowd. 539. And see Parker *v.* Plumber, Cro. El. 190.

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(7) The strictness of pleading requires that gifts or grants by circumlocutory phrases, be stated and described according to their true legal effect. So that if in a plea to an action of trespass the defendant state that the plaintiff licensed him to enter and occupy the land for the space of a month, such a plea would not be good: but he *ought* to say that the plaintiff *leased* the land to him for that time; for the facts will not prove a *licence* but a *lease*, notwithstanding the expression in the grant. See Plowd. 154, 542.

(8) Cited in Paramour *v.* Yardley, Plowd. 542. and approved by all the Court; and see Cary *v.* Appleton, Ch. Ca. 240. where the same distinction is taken; and see Moor, 754. 3 Bulst. 105. and Allen 55. in which last case it was admitted that an *authority* to take the profits implies as much as a devise of the profits.

it during his life; and that after his death C. should have it in the same manner for his life; and that after his death it should be disposed of by his executors to the use of a church, and died; and B. took the book, and kept it by force of the devise, and delivered it to the wardens of the said church, and died; then C. took the book, and the churchwardens brought an action of trespass against him: and it was the clear opinion of the Court that the action was maintainable, because the book was never delivered to C. by the executors; and the occupation or possession of B. was no execution of the legacy to C. because nothing was devised to B. but the occupation; and the like to C.; for the devise proves in itself that the *property* of the book was always in the executors, to the intent that they should dispose of it to the use of the church. The occupation was a distinct thing from the property: the occupation of one was not the occupation of the other: but their occupations differed from each other, and were several things devised out of the principal, for which reason the occupation of B. was no execution of the occupation of C.

By a devise of the *ground-rent* the reversion will pass.

As a devise of the rents and profits passes the land itself, so, by a devise of the ground rent reserved on a lease for years, the reversion has been held to be carried to the devisee. This was determined in the case of Maundy *v.* Maundy, (*e*) which case was as follows: On a special verdict in ejectment for houses in ——— square, it was found that Ventris Maundy being seised of the reversion in fee of the houses, which were of the value of 260*l.* per annum, but then let on a lease for 60 years, at 22*l.* per annum, called a ground rent, and having several sons and daughters, made his will in April 1696, in the following terms; "In respect to my worldly estate, wherewith it has pleased God to bless me, I dispose of it as follows: To my son Daniel I

(*e*) Strange, 1020. Fitg. 70. 288. S. C. in C. B. cas. temp. Lord Hardwicke 142. 2 Barnard, K. B. 202.

give 4*l.* per annum of my ground rent;" and in like manner he parcelled out the whole 22*l.* to his children (except the eldest), his, her, and their assigns for ever. "But as to Ventris, my eldest and undutiful son, I give him, in hopes he may reform, 5*l.* per annum, due on blank tickets in the million lottery. And if any of my other children die, their legacy to go to the survivor, my said undutiful son excepted, who is to have no share or part thereof, nor any more share or portion than I have before given him."

The building leases being expired, the heir of Ventris the eldest son, brought this ejectment, insisting that the reversion was undisposed of; and that, however strong the intention to disinherit the eldest son appeared, yet, if it was undisposed of, he must have it.(*f*) And, upon argument in the Common Pleas, judgment was given against him in favour of the devisee, which judgment was affirmed in the King's Bench. And the case of Kerry *v.* Derrick (*g*) was relied on as good authority, and precisely to the point. So, in a subsequent case (*h*) in Chancery, it was held that a bequest of *leasehold ground rents* passed not the reserved rent only, but the whole reversionary leasehold interest.

An unrestricted bequest of the growing interest or produce of money in stock, passes the principal or capital.

If a testator bequeaths generally, and without limitation, the produce of a sum of money, this is held to be a disposition of the capital. Thus A. bequeathed 2000*l.* to trustees, in trust to pay the produce to her daughter M. E., for her sole and separate use, and empowered her said daughter to dispose of the 2000*l.* as she should by will or writing appoint. She also gave the residue of her personal estate to the same trustees, in trust to pay the produce to M. E. for life, her receipt alone to be a sufficient discharge, and after her death in trust to pay the interest to her (the testatrix's) grand-

(*f*) See Denn *v.* Gaskin, Cowp. 661.

(*g*) Moor, 771. Cro. Jac. 104. cited in 2 Vern. 400. as Cherry *v.* Dethick.

(*h*) Kaye *v.* Lakon, 1 Bro. C. C. 76.

daughter for life; and in case her granddaughter died, leaving a child or children, she empowered her to dispose of such residue to such child or children as she should think fit; but if she died without leaving any child, the testatrix gave the residue to the children of her mother W. S. M. E. died without having made any appointment; and the sum was claimed by her personal representatives.

Sir Lloyd Kenyon appears to have been of opinion in the above case, that the first words, 'in trust to pay the produce to M. E. for her separate use,' being unaccompanied by words limiting the duration of the trust, gave her the absolute interest; and that the subsequent words, giving her the power of appointment, were merely an anxious expression of the intention of the testatrix that she should have an uncontroulable power of disposing of the fund. (*i*)

In like manner a bequest of the interest of stock carries the capital, if the gift is expressed in indefinite terms. Thus, a testator devised the residue of his real and personal estate to trustees to convert into money, and invest in government or real securities; and, after some particular dispositions, directed that his trustees should pay all the rest, residue, and surplus, of the *dividends and interest* of the stocks and securities which should be vested in them unto several persons therein named in equal shares and if any of such persons should die before twenty-one, the share of the deceased should be divided equally among the survivors; and if only one survivor, he should be entitled to the whole *residue and surplus*. Sir P. Arden, Master of the Rolls, held that the *capital* of the residue passed to the legatees. (*k*)

So in a late case, where a testator, after giving some pecuniary legacies, bequeathed the remainder, after his debts were paid, to his mother for life, and at her death

(*i*) Elton *v.* Sheppard, 1 Bro. C. C. 532.
(*k*) Phillips *v.* Chamberlaine, 4 Ves. Jun. 51.

to C., and afterwards interlined "the interest of" before the words "the remainder," Sir T. Plumer, V. C. held that C. was entitled to the capital of the residue, it being a gift of the interest of personalty without limitation.(*l*)

So also where a testator, after directing the sale of some estates, and bequeathing legacies out of the proceeds, ordered his trustees to invest the surplus monies in the public funds, and to pay and apply the interest and dividends arising from the same to two persons therein named equally between them as tenants in common, Sir W. Grant was clearly of opinion that the bequest carried the absolute interest in the stock. (*m*)

The intention, however, in this, as in all other cases, must, if it can with any clearness be collected from the context, prevail. Thus A. having by will given several annuities, and directed the manner in which they were to be paid, made the following disposition by his codicil: —"I give to Jannet Innes 200*l*. a-year for the use of herself and children; which annuity is to be paid out of my general effects, until it be convenient to my executors to invest 5000*l*. in the funds *in lieu thereof*, for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest while one or more of them alive." And the question being whether the principal or interest only of the 5000*l*. was given by the codicil, Sir Wm. Grant, M.R. observed that it was very difficult to form any decisive opinion upon a codicil so obscurely penned: but he inclined to think that it was not the intention of the testator to give a principal sum, but to secure an annuity only. It was a mode taken by the testator in many parts of his will; giving annuities, and directing the manner in which they should be paid. It was evident upon the whole that the testator did not mean to convert the annuity at a given period into a legacy of a specific sum; but intended it to continue as an annuity

(*l*) Clough *v.* Wynne, 2 Madd. 188.
(*m*) Page *v.* Leapingwell, 18 Ves. Jun. 463.

during the lives of the legatees; and that the survivor of them should receive the whole interest; and that, until there should be a survivor, all the legatees should receive the whole annuity among them. (*n*)

Of the effect of the word *premises*.

With respect to the force and extent of the word *premises* in a will, it is obvious that, being entirely a word of reference, it will be commensurate in its operation to the extent of the words to which it refers; and as it may be extended by reference to any number of terms, its descriptive force may thus be made to cover a variety of subjects having no connection or affinity among themselves. Thus in a case (*o*) where a testator devised as follows: "I give and devise all that my messuage, dwelling-house, or tenement, with the shop, barn, stable, and other buildings thereunto belonging, which said messuage or tenement, buildings, lands, or premises, are now in my own possession, and all other my real estate whatsoever, in M. or in any other place whatsoever, to S. and her assigns, for and during the term of her natural life; and, from and after her decease, I give and devise the said messuage or tenement, buildings, lands, and premises, unto my youngest son W. B., his heirs and assigns for ever;" it was held that the word *premises* used in the devise to B. carried all that was before given to A., and was not confined to premises in the testator's own possession, so that a reversion in fee of another messuage, to which the testator was entitled after the determination of a life in being, in whose possession it was outstanding during his lifetime, passed to the devisee in remainder.

(*n*) Innes *v.* Mitchell, 6 Ves. Jun. 464. And see Sansbury *v.* Read, 12 Ves. Jun. 75.

(*o*) Doe d. Biddulph *v.* Meakin, 1 East, 466.

SECT. III.

Of the interest conveyed by certain terms in a will; as Estate, Hereditaments, Inheritance, Property, Effects, &c.

THE word 'estate' is a word of great compass; predicable of every species of property, corporeal or incorporeal, real and personal. It may also embrace every description of interest; and so far is it from being necessary in a will to add words of inheritance in order to make it pass a fee, that words of restraint must be added, or specific grounds for inferring a narrower intention in the testator must be shewn, to make it import less than the fee, (1) where the fee is disposable.

In the great case of the Countess of Bridgwater *v.* the Duke of Bolton, (*p*) Lord Holt has commented very learnedly upon the force of the word, taken separately, or in combination with others. The questions were whether the words 'all my real and personal estate' passed the fee-farm rents; and if they did, whether they passed the fee-simple, or only a life interest, there being no words of inheritance in the will. (2)

(*p*) 6 Mod. 106. Lord Hardwicke has said that this is a book of no authority, but that this case is well reported in it.

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(1) See Barnes *v.* Patch, 8 Ves. Jun. 604. The position of Lord Trevor in Shaw *v.* Bull, 12 Mod. 592. where he says that 'my estate,' 'the residue of my estate,' or 'the overplus of my estate,' may pass the estate, *where the intent is apparent to pass it*, is therefore to be considered as too narrow.

(2) The devise was to B., his executors and assigns: but this form of limitation does not seem, according to the latest and best authorities, to weigh much against the effect of the word *estate*; except perhaps where, in Chester *v.* Painter, 2 P Wms. 335. and Rogers *v.*

And, first, it was held that the rents passed: for the word 'estate' is *genus generalissimum*, and includes all things, real and personal; and, secondly, that the word 'estate,' *ex vi termini*, passed the fee in a will. (3)

Estate or *estates*, though particularized by name and place, will carry the fee-simple.

It is observable, however, that Lord Holt laid considerable stress on the accompanying words 'all and my.' The word 'all,' in his opinion, made the devise more comprehensive; and the word 'my,' being a word of relation, expressed the amount of the identical interest

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Buggs, Andr. 210., the testator has shewn his own clear apprehension of the difference between these different forms of limitation, by his addition of the word *heirs* to the word *estate* in other parts of his will. But even this argument has been considered as of little force in other cases; especially if from the general context of the will an intention to give the whole may be collected. See Ibbetson v. Beckworth, Ca. temp. Talb. 157.

(3) Lord Holt observed, that "most certainly in grants the word *estate* would not pass a fee, because the law had appointed, that let the intent be ever so fully expressed and manifested in grants, without the word 'heirs,' the fee should not pass. Litt. Ten. Sect. I.; and that even if a feoffment were made *to J. S. to have to him a fee-simple*, which words could have no other sense than to pass an inheritance, yet that an estate for life only would pass; 4 Com. Dig. 'Estates' (A. 2.) but that in a will it was otherwise; because a will of lands was a new conveyance, created by the statute, whereby a man was enabled to devise all his socage land *at his will and pleasure*; so that when a person manifestly shewed his intent that the devisee should have the inheritance, the statute that empowered him to devise his estate at his pleasure would make his disposition good without tying him up to the forms of the common law." This reason will, however, occur to many readers, to be imperfect and unsatisfactory; for where lands were devisable before the statute, by the customs of particular places, the same latitude and indulgence was allowed to testators; who are to be supposed, in the majority of cases, to make these final dispositions of their property, in a condition of mind in which it would be unreasonable to expect correct phraseology. Thus where lands were devisable under the custom of a place, express and precise words of limitation were not necessary by the common law; for a devise of lands to a man, *et sanguini suo*, passed an estate tail. 1 Roll. Abr. 834. pl. 17. And so a devise of lands to a man, in fee-simple, or to him and his assigns for ever, has always passed a fee-simple. See Doe d. Lady Dacre v. Roper, 11 East. 518.

which he had in the subject, *viz.* a fee. But subsequent cases have given to the word 'estate,' simply taken, a more absolute and independent force. And where it has been coupled with words of local description, or used in the plural number, it has been held to transmit all the testator's interest in the subject. Where a testator devised all his estate *in* D., it was decreed that the fee passed. (*q*) And the same point was afterwards ruled by Lord Hardwicke; (*r*) who, in a subsequent case, considered the distinction between *in* or *at* a place as an idle distinction. (*s*) In the case of Holdfast on dem. of Cowper *v.* Marten, (*t*) where the testator gave and bequeathed to B. his estate *at* B., A. was adjudged to take the estate at B. in fee.

Lord Hardwicke, in the above cited case of Goodwyn *v.* Goodwyn, remarked that though later cases had gone farther than that of the Countess of Bridgewater *v.* the Duke of Bolton, and had held that by a devise of 'all my estate *in* or *at* such a place, not only the lands themselves, but all the interest passed;' yet that there was no case in which it had been so held, where there was a farther description, as in the case then before him, *viz.* in the *occupation of particular tenants.* The word, too, being *estates,* and not estate, made such a difference in the case as to induce him to suspend his judgment.

Both these difficulties appear now to be removed. In the case of Fletcher *v.* Smiton, (*u*) it was clearly decided that the word *estates* in a will carries the fee, unless coupled with other words that shew a different intention. And in a recent case, (*v*) a devise of all my estate, lands, &c. known and called by the name of the coal-yard, in the parish of St. Giles's, London, was

(*q*) Barry *v.* Edgworth, 2 P.Wms. 522.
(*r*) Tuffnell *v.* Page, 2 Atk. 37.
(*s*) Goodwin *v.* Goodwin, 1 Ves. 228.
(*t*) 1 T. R. 411. (*u*) 2 T. R. 656.
(*v*) Roe d. Child *v.* Wright, 7 East. 259.

held to carry the fee-simple in the premises devised. The law must, therefore, be considered as settled, that no words describing the situation of, or otherwise particularizing, the land devised, shall restrain the word *estate* from carrying the fee-simple. In the last-cited case the Court adopted Lord Hardwicke's remark in Goodwyn *v.* Goodwyn, "That there was no reason why the words *in the occupation of* B. and D. should restrain the extent of the word *estate* more *than the locality, which would not.*" It is not surprising, therefore, that after these decisions the Court of Common Pleas should have interposed in a very late case to save the counsel the trouble of arguing that a devise of 'all my estate *of Ashton*' passed the fee-simple. (*u*)

The fee will not pass by force of the word *hereditaments* alone.

As to the word *hereditament*, the better opinion seems always to have been, that it does not *per se* denote the *quantum* of interest conveyed. Thus in the case of Hopewell *v.* Ackland, (*v*) upon its being contended that the word *hereditament* imported an inheritance, Lord Trevor stated decisively that this word *hereditament* cannot be taken to denote the measure or quantity of estate; but that it has a larger meaning than *lands* and *tenements*, as it may extend to annuities, advowsons in gross, &c. And in the subsequent case of Canning *v.* Canning, (*w*) it was said by the Master of the Rolls, that the law was settled in the case of Hopewell *v.* Ackland, that a fee will not pass by the word *hereditaments*. Again Lord Kenyon in the case of Doe d. Palmer and Others *v.* Richards, (*x*) admitted that the words "all the rest, residue, and remainder of my messuages, lands, tenements, and *hereditaments*," were not sufficient in law to carry a fee: and the same was held for law in

(*u*) Sir Arthur Chichester *v.* George Chichester Oxendon, 4 Taunt. 176. The Chief Justice observed, that he did not think it would have helped the plaintiff much if the testator had said, 'All my Ashton estate.' And in Bailis *v.* Gale, 2 Ves. 48. a devise of "all the estate I bought of M." passed the fee.

(*v*) 1 Salk. 238. (*w*) Mosely 241.

(*x*) 3 T. R. 358.

the subsequent case of Denn d. Moor *v.* Miller. (*y*) The law on this point may therefore be regarded as settled contrary to the single opinion of Powell, J. in Lydcott *v.* Willows, (*z*) who said that *hereditament* was equivalent to the word *inheritance;* and that it could not be doubted that if a testator, seised of lands in fee-simple, devise the same by the words 'my inheritance,' the fee would pass.

The fee passes by the word *inheritance.*

That by the word *inheritance* the fee passes in a will is sufficiently settled upon the authority of Lord Hobart (*a*) and Lord Holt. (*b*) And in the case of Trent *v.* Hanning, (*c*) where the testator had appointed certain persons 'trustees of inheritance,' for the execution of his will; though Lawrence, J. thought these words too vague and indefinite to pass the fee, the other three Judges considered that the testator plainly meant to make trustees of his estates of inheritance in the same manner as if he had used the words 'trustees of my inheritance,' or 'trustees to inherit my estates;' and they therefore certified their opinion that the trustees took the fee-simple.

Of the import of the word *property.*

Lord Mansfield has said, (*d*) that the word *effects* is equivalent to *property* or *worldly substance:* but later cases have established a distinction between them of considerable importance. In the case of Doe, Lessee of Wall, *v.* Langlands, (*e*) the word *property,* unaffected by the context of the instrument, was considered as comprehending all that the testator is worth, and as passing as well his real as personal estate; in which case there were no introductory words expressing an intention of disposing of every thing the testator had; and the word *property* was immediately followed by words indicative only of personal estate, *viz.* 'goods and chattels.' As to the question, which the Chief Justice said was the

(*y*) 5 T. R. 558.
(*z*) 3 Mod. 229.
(*a*) Widlake *v.* Harding, Hob. 2.
(*b*) Lord Raym. 834.
(*c*) 7 East. 97.
(*d*) Hogan *v.* Jackson, Cowp. 299.
(*e*) 14 East. 370.

material one in the case,—whether the words immediately following the word 'property' were descriptive of the *kind* of property the testator intended to give, his Lordship disapproved of construing them, as explanatory of what was meant by *property;* and maintained that it was more obvious and natural to read the words cumulatively, *i. e.* as 'my property *and* goods and chattels,' than as 'my property, *namely,* my goods and chattels.'

It is not easy, indeed, to find any solid principle of distinction between the case of Doe *v.* Langlands, above cited, and that of Roe d. Helling *v.* Yeud, (*f*) which a year or two before was decided in the Court of Common Pleas; where the testator, after directing his debts and funeral expenses to be paid by his executors, and making several bequests of annuities and money, devised to his five grandchildren, whom he appointed executors, as follows:—"To whom I give all the remainder of my *property* whatsoever, and wheresoever, to be divided equally, share and share alike, after their paying and discharging the beforementioned annuities, legacies, and demands, or any I may hereafter make by codicil to this my will; all my goods, stock, bills, bonds, book-debts, and securities in the Witham drainage in Lincolnshire, and funded property." There being no provision throughout the will that appeared to have any relation to real estate, and nothing being given to any person his heirs and assigns, and the intention of the testator seeming to the Court to be at most doubtful, it was determined, upon the general rule, that an heir ought not to be excluded, unless the intention to give the real estate away from him appears plainly by the will itself.

The reason of the opinion of the Court of Common Pleas, that the testator meant only to dispose by will of his personalty, was the particular enumeration of personal things at the end of the clause: but the case must

(*f*) 2 N. R. 214.

be considered as irreconcileable with the decision of the Court of King's Bench, unless we can find a principle for deciding how many particulars enumerated after the word 'property,' expressive of personal estate only, shall restrict the sense of that sweeping term to a disposition of personal things alone.

Of the import of the word *effects.*

The case of Hogan d. Wallis and Others *v.* Jackson, (*g*) which had been nine years depending in the Courts in Ireland, turned upon the single question whether the residuary clause expressed in these words, "I also give and bequeath unto my dearly beloved mother, Mary Jackson, all the remainder and residue of all the *effects,* both *real* and personal, which I shall die possessed of," were sufficient to pass the real estate. It was contended at the bar that the word *real* might be satisfied by confining its sense to *real chattels;* (4) and though Lord Mansfield and the Court decided that the phrase *real effects* clearly carried the real estate, yet their decision seemed rather to found itself upon the capacity and extent of the word itself in legal phraseology (5) than upon the principle which is now taken as the hinge of all these cases, *i. e.* the intention of

(*g*) Cowp. 290.

(4) The force of the word *real,* when added to a general term, such as property or effects, can at this time hardly be doubted. But where the devise was of all his goods and *chattels,* real and personal, moveable and immoveable, Lord Hardwicke, upon very plain grounds of distinction, was of opinion, that the lands would not pass by the law of England, though they might have so done by the civil law. Grayson *v.* Atkinson, 2 Wils. 333. See Markam *v.* Twysden, 1 Eq. C. Abr. 211. and see Ridout *v.* Pain, 492. Chattels real are not called so because they are real estate, but because they are extractions out of the real estate, *per* Holt, C. J.

(5) As the Courts had already got so far as to hold that the word *legacy* might signify a devise of land, when used in a will in that sense, (by Lord Macclesfield in Beckley *v.* Newland, 2 P. Wms. 182. and by Lord Mansfield, in Brady *v.* Cubit, Dougl. 40.) one might have expected that in the case above cited Lord Mansfield would have rested the question, as to the extent of the word *effects,* upon the broad ground of intention.

the testator, without any technical regard to the words used by him.

In Doe d. Chilcott *v.* White, (*h*) Lord Kenyon can hardly be said to have carried the doctrine farther by holding that, where the testator, having before devised real and personal property to his wife for her life, empowered her to give what she thought proper of her *said effects* to her sisters for their lives, the disposing power extended to the *realty*.

In the case of Doe on the demise of Andrew and Others against Lainchbury and Others, (*i*) the words *property* and *effects* occurred in the residuary devise, blended with an enumeration of personal things: but they were both considered as embracing the real property, the testator having used them in other parts of his will to describe real estate. By the residuary clause he devised all his "*money, stock, property, and effects*, of what kind or nature soever, to A. and B.; to be divided equally between them, share and share alike:" but he began his will by stating "as to my money and *effects* I dispose thereof as follows;" and then proceeded to dispose of parts of his *real* estate. And again, having *lands* lying together with the *lands* of another person, he directed the latter to be purchased, if offered for sale, to be added to his other adjoining *property*: thus shewing, by his own use of the words, that he considered them as being applicable as well to real as to personal estate.

Of the doctrine of construing words as *ejusdem generis* with the accompanying words.

No criterion is more frequently resorted to in the books for expanding or contracting the sense of the words *estate, property*, and *effects*, than the company in which they appear. Where a man, seised in fee of lands absolutely, and of other lands by mortgage not forfeited, devised first all his lands in fee to A., and all the rest of his goods, chattels, estates, mortgages, debts, &c., to C., it was holden that no freehold passed; (*k*)

(*h*) 1 East. 33. (*i*) 11 East. 290.
(*k*) Wilkinson *v.* Maryland, Cro. Car. 447. 1 Rol. Abr. 834.

and of this decision Lord Holt strongly approved in the great case of the Countess of Bridgewater *v.* The Duke of Bolton, above-cited.

A long list of determinations to the same effect has been confirmed by a case (*l*) decided by the present Lord Chancellor. There the testator, after directing that his debts should be paid out of his personal estate, gave certain legacies; and having a real estate *in land*, and a real estate in a rent-charge, devised the latter to his wife for life, and after her death to trustees to sell; and, after giving some more legacies, directed that as and for the monies to be received from the sale and disposal of the said rent thereinbefore devised in trust to be sold on the death of his wife, as also the monies to arise from a sale of the remainder of his household goods and furniture, plate, linen, china, beds, and bedding, and from all other his *estate* and effects, of what nature or kind soever, or wheresoever, the same should in the first place be subject and liable to, and charged and chargeable with, the payment of the before-mentioned legacies; and the residue of such monies, to arise as aforesaid, he directed to be divided and applied as therein mentioned.

Upon this will, Lord Eldon observed, that, though the words charging the personal estate with the legacies could mean nothing, the personal estate being by law chargeable with the legacies, yet that they were capable of being fairly enough interpreted as applicable to the money arising from the sale of the real estate. The question was, whether upon the whole it was not clear that the testator did not mean that any thing of a real nature should pass under the word *estate?* For that purpose every part of the will must be looked at, to determine, whether that word, in the context in which it occurred, and upon the general intention of the will, and all the phrases of it taken together, was to be understood *ejusdem generis* with the personal estate immediately before described, or as meant to take in

(*l*) Woollam *v.* Kenworthy, 9 Vez. J. 137.

the real estate. It was to be considered whether by the insertion of this word, where it occurred, the testator, who had anxiously provided for the application of a real estate, expressly devised upon the trust, could be taken to mean that this other real estate of which he was so seised should, by the effect of the word 'estate' standing as it did, be clothed, in the hands of the heir, with a trust of the very same nature as the estate specifically devised to the trustees. That was not the probable intention upon the will, taken altogether; and upon the whole he thought, and so decreed, that the estate in question descended upon the heir at law, for his own benefit.

Where the testator expounds his own meaning in the use of the word *estate*, by shewing of what he understands it to consist, there can be no room for doubt. This was the plain reason of the decision in Timewell *v.* Perkins, (*m*) by Mr. Justice Fortescue, at the Rolls. The clause was thus: "*Item*, all those my freehold lands and hop-grounds, with the messuages, &c. now in the tenure of L.; and all other the rest, residue, and remainder of my estate, *consisting* in ready money, plate, jewellery, leases, judgments, mortgages, &c. or in any other thing whatsoever and wheresoever, I give to A. H. and her assigns for ever."

Where the word *real* is added to the word 'estate,' whatever words of limited expression or partial extent may precede, or surround, or follow, it would be difficult, indeed, to maintain, that any thing less than both land and inheritance are embraced by it. Thus in Ridout *v.* Pain, (*n*) where a testator gave all the rest, residue, and remainder of his goods and chattels, and personal estate, *together with his real estate*, Lord Hardwicke said there could be no question but that the words, "together with my real estate," would carry the land and inheritance, though accompanied with the other words "goods and chattels, &c."

(*m*) 2 Atk. 102. (*n*) 3 Atk. 486.

Whether the word 'estate,' 'property,' and others of that general class, precede or follow the enumeration of particulars, is a circumstance which seems to afford no solid criterion for deciding whether they are, or are not, to be construed *ejusdem generis*, with the particulars specified.

Where the word *estate* comes after several words properly descriptive of personalty only, Lord Hardwicke has furnished a test more intelligible and applicable than many others which have been relied on. He says that where the preceding words fully comprehend all the personalty, so that there is nothing to satisfy the word 'estate,' unless it be held to apply to the real property, there, notwithstanding the company in which it is found, it will pass the real property of the testator.

The case in which the above distinction is found is that of Tilly *v.* Simpson, (*o*) in Chancery, Easter, 1746. The testator, after declaring that he intended to dispose of all his worldly estate, and making several devises to different persons, gave and bequeathed "all the rest and residue of his money, goods, chattels, and estate whatsoever, to his nephew A. B.;" and the question was, whether a beneficial interest in a real estate not before disposed of would pass to the nephew by this devise.

Lord Hardwicke was of opinion that it would. He said, that where the court had restrained the word *estate* to carry personal estate only, it had appeared that it was the intention of the testator that it should be so understood: as where it was coupled with particular descriptions of part of the personal estate, as a bequest of "all my mortgages, household goods, and estate," in which the preceding words were not a full description of the personal estate. But that it was otherwise where the preceding words were sufficient to pass the whole personal estate. If the testator had

(*o*) 2 T. R. 659. Note to Fletcher *v.* Smiton.

said, "all the rest and residue of my personal estate and estates whatsoever," a real estate would have passed. His Lordship then observed that the bequest in the case before him amounted to the same, for the word *chattels* was a full description of the personal estate; therefore, since the testator had used words comprehending all his personal estate, and then had used the word *estate*, that word would carry a real estate. That the word *whatsoever* was used, which was the same as if he had said, *of whatsoever kind it may be;* (6) and if that had been the case, it would most certainly have carried the real estate. The case of Tirrell *v.* Page (*p*) was, his Lordship said, very material to the question; and he thought the cases could not be distinguished. There the gift was of "all the rest and residue of my money, goods, and chattels, and all other estates whatsoever, I give to J. L." The only difference was in the word *other*, which he did not think could distinguish it. If it had been 'all the rest and residue of my household goods and mortgages and all other estate,' he did not think that those words would have carried the real estate.

If the reasoning of Lord Hardwicke be thought a little refined, and seems, as far as it proceeds upon the ground of executing the intention, to found the inference of intention upon a distinction of words rather too technical to decide the meaning of unlearned testators, it nevertheless affords a principle of some certainty; and which, if adhered to, may at least conduce to judicial consistency.

The word *effects*, we have already seen, by its general import, carries *per se* nothing beyond the per-

(*p*) 1 Chan. Ca. 262.

(6) In the case, already cited, of Woolham *v.* Kenworthy, 9 Vez. J. 137. the word *estate* was preceded by the word *other*, and followed by the words *of what nature or kind soever;* and yet it was confined to things *ejusdem generis*.

sonalty; although, like all other words of description in a will, its sense may be enlarged so as to embrace real estate by force of the context. But though the words *wheresoever and whatsoever,* or *of what nature or kind soever,* follow the word *effects,* they are not sufficient without other aid from the context to bring real estate within the descriptive force of the term. Thus, where a testatrix, seised in fee of real estate, devised "all the rest, residue, and remainder of her effects wheresoever and whatsoever, and of what nature, kind, or quality soever," (except her wearing apparel and plate), to certain nephews and nieces, to be equally divided between them by her executors, it was held that the residuary clause did not carry the real estate. (*q*)

Where the descriptive term is followed by the words 'wheresoever,' or 'of what nature and kind soever.'

There were several circumstances indeed in the will last mentioned, to oppose the extension of the word *effects* to real estate; as, the exception of wearing apparel, and the placing the subjects of the devise under the management of the executors. But in a case lately determined in the Court of King's Bench, the rule seems to be established that a simple disposition by a testator of *all and singular his effects, of what nature and kind soever,* will only pass the personal estate. (*r*)

Nor will this word, although followed by the words *of what nature and kind soever,* always embrace the whole *personal* property of the testator; it is often confined to such particulars only as are *ejusdem generis* with certain matters and things before enumerated. Thus, where a testator bequeathed to his wife an annuity of 200*l.* per annum, being part of the monies he then had in bank security, entirely for her own use and disposal, *together with all his household furniture and effects, of what nature or kind soever,* the word was confined to articles *ejusdem generis,* that is, to household furniture. (*s*)

(*q*) Camfield *v.* Gilbert, 3 East. 516.
(*r*) Hicks *v.* Dring, 2 M. and S. T. R. Trin. Term, 1814.
(*s*) Rawlings *v.* Jennings, 13 Ves. J. 39.

It is very material, however, to observe that, in the case last-mentioned, part of the testator's personal property was devised to the wife in the foregoing part of the will;—a circumstance tending strongly to shew that the testator meant the word *effects* to receive a limited interpretation. And this circumstance was sufficient to weigh against the consideration of the intestacy as to some of the property of the deceased which was the consequence of the construction adopted.

Of the effect of a particular exception to enlarge the import of a general description.

In the case of Camfield *v.* Gilbert, a little above cited, it appeared that the exception of wearing apparel and plate served in some measure to mark and circumscribe the meaning which the testator meant to give to the word *effects;* for, by the exception, the class out of which the exception was made was implicitly characterized. And upon the same principle of construction the sense of the word *effects* was in another case *enlarged* by force of the exception. Thus where the words in a codicil were "plate, linen, household goods, and *other effects,*" (money excepted), Lord Eldon observed, that though the doctrine appeared to be settled in the Court of Chancery, that the words *other effects* in general meant effects *ejusdem generis;* yet as *money* could not be represented as *ejusdem generis* with plate, linen, and household goods, the express exception of *money* out of the *other effects* shewed the testatrix's understanding that it would have passed by those words; and that express words were required to exclude it. He thought the words of the bequest would carry things not *ejusdem generis.* The disposition, therefore, must be taken to comprehend all that she has not excluded, which was money only. His Lordship accordingly decided, that stock in the funds, (which does not pass under the word *money,*) was included in, and passed under the words of the bequest. (*t*)

One clear doctrine results from all these cases:—that although the word 'estate,' taken independently

(*t*) Hotham *v.* Sutton, 15 Ves. J. 319

of the context, by its own force, denotes not only real as well as personal estate, but the highest degree of real estate, and the word *property* carries of itself both real and personal property, while the word *effects* is generally and properly applicable to personal estate only; yet that all these words, and indeed every form of expression whereby a testator declares his will in respect to the disposition of his property, submit to the rule which requires a will to be construed agreeably to the intention of the testator, where it can be fairly collected from the whole instrument, and is consistent with law and policy.

SECT. IV.

Designation of Persons.

IN the preceding Sections of this Chapter we have considered the import of words and phrases relating to the *subjects* of testamentary dispositions;—we shall now treat of the descriptive force of certain denominations in reference to the *objects* of donation.

The word 'heir' may be used in its popular sense, as heir apparent, or presumptive.

The limitation of an estate to the heirs or heir of a person in existence must, if the term be used as descriptive of a class of persons, be considered as depending upon a contingent event; for *nemo est hæres viventis:* who will be heir of such living person at his death is unknown, and by no possibility can be ascertained. But it has long been settled that a testator may use what terms he pleases to describe the object of his devise; and for that purpose may adopt the word 'heir' out of its technical sense simply

for the sake of designating the object of his bounty. If he devises to the heir of a person in existence; and at the same time shews by the context, or by other parts of his will, that the word *heir* was only used by him in its popular sense, to denote the individual who is the apparent or presumptive heir of the person so in existence, his language will be taken in that sense; and the law will consider the term as used only as a medium for designating the particular object in the contemplation of the testator. The individual intended being ascertained, and in being, such limitation, notwithstanding the maxim that there can be no heir of a living person, becomes, in the light in which it is viewed, a vested remainder.

Thus in the case of Burchet *v.* Durdant, (*d*) where a testator devised lands to J. and his heirs during the life of B., in trust to permit and suffer B. during his life to receive the profits, he committing no waste; and after the decease of B., then to the heirs male of the body of B. 'now living,' and to such other heirs male or female as he thereafter should happen to have of his body; and B. had issue, C. a son, living at the date of the will: the Court of K. B. determined that B. had only a trust estate for his life, and that C., son of B. took an immediate vested estate in tail: which as the interest of the father was considered as a trust only, and not the legal estate, would have been a contingent remainder, if the limitation to the heirs male of B. had been regarded as technically descriptive only of the quality of the persons to take. The words "now living" were relied upon as importing a sufficient designation of the person.

And in another case where the testator charged his lands, amongst other matters, with an annuity to his

(*d*) 3 Vent. 311. We are to observe that the Court construed the estate of the father a *trust* only: but that the words, 'in trust to permit, &c.' were considered afterwards by Lord Holt, in the case of Broughton *v.* Langley, 2 Salk. 679., as giving by the statute the legal estate to B. the father.

daughter M. for twenty years if she and his son R. should so long jointly live, to commence at the end of the term of two years thereafter given in the premises to the said M. and the death of his (the testator's) wife and devised the same lands to his daughter M. for two years after his decease, with remainder to his son R., (if then living) for ninety years, if he should so long live; and then devised the premises so subject, to R's heir male, and to the heirs of his daughter M., jointly and equally, and their heirs and assigns for ever; and M. and R. had each a son; De Grey, C. J., premising that the question was, whether there was a sufficient designation of the person to make the son of M. take as her heir, living the mother; and that such question would have been decided two hundred years ago upon the legal and technical import of the words used, but that for some time a more liberal construction had prevailed, declared his opinion, that the son of M. was entitled to a moiety with the son of R.; for that the intent was clear, that the same favour was extended to the heirs of M. as to the heir male of R.; and that the testator had taken notice that M. was living, by leaving her a term, and a subsequent annuity, to which the land was to go subject; and that his intention was that a present interest should vest in her heir, meaning her heir apparent during her life; to which the Court agreed.

It may be proper here to notice the rule laid down by Lord Coke, (*e*) and our earlier writers, that a person in order to be qualified to take by purchase, by the description of heir male, or other special designation, must fulfil both parts of such description, by being as well the heir general, as the special heir denoted by the terms of the instrument. Mr. Hargrave, in one of his ablest notes, has defended the position. But the contrary doctrine has prevailed. And it appears now to be settled law that a person may take as special heir by

(*e*) 1 Inst. 164. a. and Mr. Hargrave's note on the passage.

purchase, without at the same time answering to the character of heir general. (*f*)

Stock, family, or house.

It is said that a devisee may be sufficiently designated by a devise to a stock, or family, or house; and that it shall be understood of the heir principal of the house; for as it is doubtful what is the precise meaning of these terms, the law shall prevail which favours the heir, as the chief, most worthy, and eldest of the family. (*g*) And that if lands be devised to the posterity of A., the lineal heir, if there be any, shall take them in virtue of such a designation; and if there be no lineal heir, the collateral heir of the whole blood shall take. (*h*) So a devisee may be described as next of kin, as in Jobson's case, (*i*) where one devised lands in tail, the remainder *to the next of kin of his name,* and it was held that his brother's daughter should take by that description. So a devise to one for life, with remainder to "my family," entitles the heir at law of the testator. (*k*)

'Relations' construed 'next of kin' according to the statute of Distributions.

Where a testator devises to his relations without any further specification, the term is construed as commensurate with "next of kin," in the statute of Distributions, which is adopted as the guide in settling the claims of the objects: nor will evidence *dehors* the will be allowed to enlarge or contract the meaning and extent of the term, on any supposable grounds of intention. (*l*)

Such construction does not render a devise in this form nugatory or inofficious, since a wife is excluded,

(*f*) See Wills *et al.* v. Palmer, 5 Burr. 2615. 2 Black. 687. and see the case of Goodtitle *ex dem.* Weston v. Burtenshaw, reported by Mr. Butler from a MS. Note of the late Mr. Serjeant Hill; and another MS. Note in that Gentleman's possession, stated in the Appendix to his edition of Fearne's Contingent Remainders and Executory Devises.

(*g*) Hob. 33. Chapman's case, Dyer 333 b.

(*h*) 2 Eq. Ca. Abr. 290—7.

(*i*) Cro. El. 576.

(*k*) See the case of Wright v. Atkyns, 1 Turn. 156.

(*l*) Whitthorne v. Harris, 2 Ves. 527. Roach v. Hammond, Prec. in Ch. 401. Harding v. Glyn, 1 Atk. 468. Green v. Howard, 1 Bro. C. C. 31.

as not being within the description of next of kin, but provided for in the statute by the name of wife. Indeed the ordinary legal sense of next of kin is never held to include the wife: thus where a man devised his residue to be divided among his next of kin, as if he had died intestate, the words "as if he had died intestate" were rejected as surplusage, and the next of kin by blood only were held entitled under the will. (*k*) So the marital right of the husband as administrator by law is excluded by a limitation to the next of kin of the wife. (*l*)

But the rule may be restricted in its application by the form of the bequest.

Neither is it without effect, though the persons to take under this construction be the same and only such as would take under the statute, for still their *shares* may be different; as if a testator *directs* a sum to be *equally* divided among his relations, it must *go to* them *per capita*, and not *per stirpes*. (*m*) So if a legacy be given to the descendants of A. and B. equally, children and grandchildren take *per capita*. (*n*) And, under a bequest to the next of kin in *equal degree*, brothers or sisters will take in exclusion of the child or children of a deceased brother or sister. (*o*) So where the bequest is to the testator's *nearest* relations: (*p*) and a bequest to testator's 'next relations,' as sisters, nephews, and nieces, will be limited to sisters and such nephews and nieces as are the children of *deceased* brothers and sisters, who may be comprehended under the term "next relations," by means of the representation admitted by the statute. (*q*) Jones *v.*

(*k*) Garrick *v.* Lord Camden, 14 Ves. J. 372.

(*l*) Anderson *v.* Dawson, 15 Ves. J. 537.

(*m*) See Thomas *v.* Hoole, Cas. temp. Talb. 251. Green *v.* Howard, 1 Bro. C. C. 31.

(*n*) Northey *v.* Strange, 1 P. Wms. 342. Blacker *v.* Webb, 2 P. Wms. 383. Phillips *v.* Garth, 3 Bro. C. C. 64. Butler *v.* Stratton, *ibid.*

(*o*) Wimbles *v.* Pitcher, 12 Ves. J. 433.

(*p*) Smith *v.* Campbell, Sir W. Grant, Master of the Rolls, 19 Ves. J. 490.

(*q*) Stamp *v.* Cooke, 1 Cox. C. C. 234.

Beale, (*r*) which carried a bequest to *relations* to the children of a cousin-german, living the parent, cannot be law; for the statute does not extend the representation among collaterals beyond the children of brothers and sisters.

But although where a person bequeaths to his relations, those who are such by affinity are not included, yet if the testator plainly indicates an intent to carry the word 'relations' beyond the extent of the statute, the Court will effectuate the disposition, the statute being only adopted from necessity. But a legacy for a mourning ring for each of the testator's relations, by blood or *marriage,* was confined by the Court to nearest of kin, according to the statute of Distributions, and to those who had married persons entitled under it. (*s*)

It has been held that an exclusive appointment, under a power of appointing to and among such of testator's relations as shall be living at the time of testator's death, in such shares as the appointer shall please, is good: (*t*) and where a trustee has the power of selecting, he may go beyond the statute of Distributions. (*u*) So where a person has a power of distribution among poor relations, he may distribute among all poor relations however remote: but wherever the Court is called in to distribute, in failure of the person so empowered, it will confine itself to relations within the statute of Distributions. (*x*)

Lord Camden has said, that the addition of the epithet *poor* did not vary the case; there was no scale for distinguishing between degrees of poverty. (*y*) But a bequest intended to have perpetual continuance in favour of poor relations is considered as a bequest

(*r*) 2 Vern. 383.

(*s*) See Davison *v.* Mellish, 5 Ves. J. 529.

(*t*) 1 T. R. 435.

(*u*) See Crewys *v.* Coleman, 9 Ves. J. 319.

(*x*) Mahon *v.* Savage, 1 Sch. and Lef. 111. and see Spring *ex dem.* Titcher *v.* Biles, 1 T. R. 435. note (*f*).

(*y*) Ambl. 636.

in favour of a particular description of poor; and the Court of Chancery will, under such a bequest, admit the claims of relatives without reference to the statute, referring it to the master to enquire who are testator's poor relations. (z) If a testator give in this way to his poor relations; one who is poor at the time of the death, but becomes rich before distribution, has been adjudged not to be entitled; and if a poor relation so entitled (a) die before distribution, his claim cannot be transmitted. (b)

It is to be observed, that as the property in these cases does not pass by virtue of the statute, (which only furnishes the rule in ascertaining the persons to take,) the shares and proportions are to be regulated according to the intent of the testator: (c) but if testator gives no directions as to the proportions in which the legacy is to be distributed, the statute will be the guide as to the distribution also. (d)

And in a late case in the Common Pleas, (e) the statute was adopted as the guide for ascertaining the relations, to satisfy that term in a will where the subject was real property.

Family.

The word *family* according to the case of Crewys v. Coleman, (f) denotes as definite an object of a devise as the word *relations*, and shall be expounded in like manner; and a disposition by will to A.'s and B.'s families has been held to entitle the children exclusively of their parents. (g)

(z) Attorney General v. Buckland, cited Ambl. 72. and see Brunsden v. Woolridge, Ambl. 507.

(a) Widmore v. Woodroffe, Ambl. 636. 1 Bro. C. C. 33. n.

(b) *Ibid.*

(c) Brunsden v. Woolridge, Ambl. 507. Butler v. Shallon, 3 Bro. C. C. 367.

(d) Thomas v. Hoole, Ca. temp. Talb. 251.

(e) Doe *ex dem.* Thwaites and Others v. Over and Others, 1 Taunt. 263.

(f) 4 Ves. Jun. 319.

(g) Barnes v. Patch, 9 Ves. J. 604. *Sed vid.* Rawlings v. Jennings, 13 Ves. J. 46.

Under a bequest, in trust for a feme covert and her family, the husband will not be included, unless from the context such appears to have been the intention.(*h*)

In a very late case (*i*) where A. devised to B. and her heirs for ever, in the fullest confidence that after her decease she would preserve the property to "my family," Lord Chancellor Eldon inclined against construing the words "my family," as denoting the objects with sufficient certainty to impose a trust upon B.; for, said his Lordship, "in order to determine whether the trust is a trust which the Court will interfere with, it is matter of observation, first, that the words must be imperative; and that the words are imperative in this case there can be no doubt. Secondly, that the *subject* must be certain; and that brings me to the question what is meant by the words 'my property.' And, Thirdly, that the *object* must be as certain as the subject; and then the question will be whether the words 'my family' have as much of the quality of certainty as this species of trust requires."

His Lordship seemed to think it was too indefinite to fall under the proper notion of a trust or a power, which ought to be capable of being exercised amongst different objects, to be selected from a class of persons, capable of definition, and of being represented with legal certainty.

Lord Eldon further observed in the above case "that 'relations' and 'descendants' were undoubtedly terms that sufficiently described a class of persons. The descendants must be persons descended from the testator: but who was his *family* was another matter. The words 'my relations,' said his Lordship, or 'my descendants,' are capable of construction: but the words 'my family,' in a popular sense, go round in such a manner that we can set no limit to them."

Next of kin.

It has been decided that under a bequest to the testator's next of kin, only those who are related in the

(*h*) M'Claroth *v.* Bacon, 5 Ves. J. 159.
(*i*) Wright *v.* Atkins, 1 Turn. 156.

nearest degree will be entitled, as they would be under the statute of Distributions, with this difference, that those who represent persons in the nearest degree would not be let in as under the statute. (*i*) *A fortiori* a bequest to the testator's next of kin in equal degree excludes the title by representation as under the statute. (*k*) But if a testator bequeaths to his 'next of kin as if he had died intestate,' the bequest will be construed with a reference to the statute, and the title by representation will be admitted. (*l*)

If a married man bequeath generally to his next of kin, the wife, as we have seen, will not be entitled; (*m*) nor will it make any difference if the bequest be "to be divided amongst his next of kin as if he had died intestate," (*n*) or "to all and every his next of kin that would have been entitled to his personal estate under the statute made for the distribution of intestate's effects in case he had died intestate." (*o*) Neither will a bequest by a married woman under a power to her next of kin *primâ facie* include the husband; to give it that extension an intent must be gathered from the context. (*p*) If a bequest be made to the next of kin after a life estate, it will be confined to those who answer the character at that time, (*q*) according to the prevailing authorities. (*r*) Where the next of kin become entitled in default of appointment, they must take in the same manner as the statute gives it,—in equal shares with the right of representation *per stirpes*. (*s*)

(*i*) By Lord Eldon in Garrick *v.* Lord Camden, 14 Ves. J. 372. and Smith *v.* Campbell, 19 Ves. J. 404.

(*k*) Wimbles *v.* Pitcher, 12 Ves. J. 433.

(*l*) Garrick *v.* Lord Camden, *sup.*

(*m*) *Ibid.*

(*n*) *Ibid.*

(*o*) Griffin *v.* Nanson, cited in Bailey *v.* Wright, 18 Ves. J. 53.

(*p*) Garrick *v.* Lord Camden, per Lord Eldon.

(*q*) Colbeck *v.* Jones, 8 Ves. Jun. 38. Maturn *v.* Savage, 1 Sch. and Lef. 111. and see Miller *v.* Eaton, Cowp. 272.

(*r*) But see Hartrington *v.* Harte, Cox. 131.

(*s*) Oke *v.* Heath, 1 Ves. 141.

Legal representatives.

Where a testator bequeathed personalty, after the deaths of persons entitled for life without leaving issue male, or any descendants of issue male, living at the time of their respective deaths, in trust for such persons as should be the legal representatives of the testator, those who were the next of kin at the time of distribution were held to be entitled. (*s*) And a bequest of personalty to the heirs of A. has been construed a gift to the children of A. living at his death. (*t*)

Heirs.

So where a testator bequeathed personal estate to A., and on A.'s dying before him (the testator,) to his heirs; and A. died in the testator's lifetime: it was held that the next of kin at the testator's death were entitled.(*u*) But where a testator makes A. heir to his estate generally, or of his real and personal estate, blending the two estates together, the person answering the description of heir to the real estate will be absolutely entitled to the real and personal estates:(*x*) though, if the real and personal estates be given by two distinct clauses to the heir, it seems that the personalty will go to the next of kin of the testator. (*y*)

A bequest of personalty to his legal representatives, according to the course of administration, has been construed to intend the next of kin according to the statute of Distributions. (*z*) But where the bequest was to personal representatives, the executor has been held to be entitled. (*a*)

(*s*) Long *v.* Blackall, 3 Ves. J. 490. Reeves *v.* Brymes, 4 Ves. J. 692.

(*t*) Beaulieu *v.* Cardigan, Ambl. 533. and see Thomas *v.* Bennett, 2 P. Wms. 342. Loveday *v.* Hopkins, Ambl. 274. Crawford *v.* Testler, cited 4 Madd. 361.

(*u*) Holloway *v.* Holloway, 5 Ves. J. 399. and Vaux *v.* Henderson, cited 1 Jac. and Walk. 388.

(*x*) Wilson *v.* Vansittart, Ambl. 560. Wythe *v.* Thureston, Ambl. 555. Gwynne *v.* Muddock, 14 Ves. J. 489. Rose *v.* Rose, 17 Ves. J. 347.

(*y*) Gwynne *v.* Muddock, 14 Ves. J. 489.

(*z*) Jennings *v.* Gallimore, 3 Ves. J. 146. Bridge *v.* Abbott, 3 Bro. C. C. 224.

(*a*) Evans *v.* Charles, 1 Anst. 128.

The cases cited below, however, for these points may be considered rather as grounded upon their own peculiar circumstances than as furnishing any distinct rules or *criteria.*

Issue.

A bequest of chattels to the issue of A. carries the bounty to all the descendants of A.; and under such description children and grandchildren, &c. are comprehended, who all take *per capita.* (*a*) But the word 'issue' will be confined to children, if such appears from the will to have been the testator's intention. (*b*) As if the testator uses the term *father* or *mother* as the correlative, or the term *parent* in its ordinary sense of father or mother. Thus where a will contained the following bequests:—"Thirdly, I will that my trustees do transfer 1000*l.* stock in a certain fund to each of my relations hereinafter named *viz.* to A., B., C., and D., the sons and daughters of T. and E. his wife, if they be living at the time of my decease; and if all or any of them should die before I do, then I will that the lawful issue of every one of them so dying before me shall, share and share alike, have and enjoy that 1000*l.* which their *respective parents,* if living, would have had and enjoyed; Fourthly, I give and bequeath unto J., the son of R. and E. his wife, 1000*l.* stock as aforesaid, if living at the time of my death; and to his lawful issue, share and share alike, if he the parent should then be dead:" it was held by Lord Eldon, that children only were intended by the word 'issue,' his Lordship at the same time observing, that if the words 'respective parents' had not been inserted, the words 'lawful issue' in the third clause must have been extended beyond children; that it was fair to put the ordinary construction on the word 'parent,' *viz.* father or mother, and then the word 'issue' would mean children; that that was the more strong upon the next clause, in which it was clear the testator did not mean *grandfather* by the ex-

(*a*) Hockley *v.* Mawbrey, 1 Ves. 157. Emery *v.* England, 3 Ves. J. 232. Davenport *v.* Hanbury, 3 Bro. 257. 3 Ves. J. 258.

(*b*) Sibley *v.* Perry, 7 Ves. J. 531.

pression 'if the parent should then be dead.' (*d*) The case contains much that is very valuable in the way of suggestion, respecting the grounds of inference for collecting the intention of a testator as to the objects contemplated by him under the word 'issue' in the disposition of personal estate.

The intention is the guide to the construction in this case, as in all other cases, of the words of a will; so that the extent of the word 'issue' will enlarge or contract itself in obedience to what the context indicates such intention to have been.

Thus the word 'issue,' which we have seen may be confined to children, or expanded so as to embrace all the living descendants, may be both enlarged and limited in its sense, so as to embrace children and grandchildren, and to exclude great-grandchildren, if the will manifest such an intention in the testator. Thus, where a testator devised certain estates on the death of A. and M. his wife, upon trust to sell, and apply the money arising from the sale, unto and amongst all and every the issue, child or children, male or female, of the body of the said A. by the said M. his wife, and their representatives, equally, share and share alike; Lord Chancellor Loughborough held that, by the expressions above quoted, the testatrix had defined the issue which she meant to take under her will, *viz.* children, and their representatives, being issue. (*e*)

Where a testator directed the residue of his personal estate to be invested in the funds, the interest thereof to be paid equally between his five sisters for their natural lives, and in case any of his said sisters should die, leaving issue, to pay the share of the residue, to the interest of which his sister so dying was entitled at the time of her decease, unto 'all and every such child and children of such deceased sister, equally between them, share and share alike, at their respective ages of twenty-

(*d*) Sibley *v.* Perry, 7 Ves. J. 522.
(*e*) Horsepool *v.* Watson, 3 Ves. J. 383.

one;' and one of the sisters died in the lifetime of the testator leaving children: such children were held to be entitled to the share of which the deceased sister was to have had the interest. (*f*)

Again where a bequest to issue is so expressed as to shew that they are intended to take by way of substitution, it is said that the bequest will be confined to the issue of persons living at the date of the testator's will, because they claim merely in substitution for their parents; and no parent of such issue would have been entitled unless living at the date of the testator's will. (*g*)

It seems that a bequest to A., or, in case of his death in testator's lifetime, to A.'s executors or administrators, would, in the event of A.'s death in the testator's lifetime, carry the property to them: but whether to them in their official capacity, or for their own benefit, (*h*) is a point which has not been decided.

But where the bequest was, in default of appointment by A., to the executors and administrators of A., to and for her or their own use and benefit, upon an ineffectual appointment by A., and his leaving a testamentary paper without naming an executor, the administrator of A. was held to be entitled beneficially. (*i*)

Whether grandchildren can take under a bequest to 'children.'

Under a simple bequest to children, grandchildren will not be let in to take with children; (*k*) though the word may by force of the context be extended in sense so as to comprehend all descendants. Still, however, grandchildren would, even under this latitude given to the term *children*, be admitted only where their parents were deceased. (*l*) So a bequest to grandchildren, without any aid from the context, will not carry the benefit to

(*f*) Rheeder *v.* Owen, 3 Bro. 241.
(*g*) Christopher *v.* Naylor, 1 Meriv. 320.
(*h*) Horseman *v.* Abbey, 1 Jac. and Walk. 381.
(*i*) Sanders *v.* Franks, 2 Madd. C. C. 147.
(*k*) Reeves *v.* Brymer, 4 Ves. J. 692.
(*l*) Royle *v.* Hamilton, 4 Ves. J. 437.

great-grandchildren; but such ulterior intention may be inferred from the circumstance, that there were no objects to answer the bequest in its proper sense. (*m*)

Bequest to children as to a class.

Where the bequest is to children, as a class of persons, descriptively not individually designated, the rule is that those who are in being at the testator's death, and only such, are entitled, if the context imposes no other construction. (*n*) Thus, where a testator bequeathed to the children of his late sister M. the sum of 2000*l.* to be equally divided among them, and gave to the same children one third of the residue of his estate, equally to be divided; and there were three children living at the date of the will, and one afterwards died; the Master of the Rolls, Sir P. Arden, held that by the words used such persons only were intended as should be children at the death of the testator.(*o*) And under a bequest to I. C. and I. H. to sell for the payment of his debts, and the overplus to be employed for the best use of their children, equally to be divided between them, and there were children born before the will was made, others after the will, and before the testator's death, and others after the testator's death: Lord Thurlow held, that the division should take place at the death of the testator; and that accordingly all the children born in the lifetime of the testator, and surviving him, were entitled, but not such as were born after his death. (*p*) And a similar determination was made by Lord C. B. Parker, sitting for the Chancellor in Heathe *v.* Heathe, (*q*) and by Lord Chancellor Camden in Isaac *v.* Isaac. (*r*)

The time of division is the period of ascertaining and fixing the shares.

And if the bequest is made subject to a power of

(*m*) Earl of Orford *v.* Churchill, 3 Ves. and Beam. 59. and see Hussey *v.* Dillon, Ambl. 603.

(*n*) Godfrey *v.* Davis, 6 Ves. J. 49. Singleton *v.* Gilbert, 1 Cox. 68.

(*o*) Viner *v.* Francis, 2 Bro. C. C. 658.

(*p*) Roberts *v.* Higman, 1 Bro. C. C. 532.

(*q*) 2 Atk. 121.

(*r*) Ambl. 348.

appointment, or accompanied with a clause of survivorship, (*u*) or a direction to executors to make payment at some future time,(*x*) as on the children attaining twenty-one, the rule of confining the benefit to the children living at the testator's death equally prevails. And reversionary interests fall under the same doctrine. Thus, a testator by his will gave the residue of his estate and effects to trustees, in trust for the benefit of all his grandchildren by his daughter Sarah, equally to be divided between them, and laid out for their respective benefit; and afterwards by a codicil directed 1000*l.* Bank annuities to be set apart for the payment of certain annuities given by the same codicil; and there were several children of testator's daughter Sarah living at the time of his death; and after his death, but during the life of the annuitants, another child was born; and the after-born child claimed a share of the 1000*l.* as not divisible till the death of the annuitants; Lord Thurlow decided that the sum so set apart must on the death of the last annuitant sink into the residue, which was divisible at the testator's death; and that it was repugnant to say that one part of the residue should be divisible at one time, and the other part at another.(*y*) If there happen to be but one only to answer the description at the time of the division, that one will be entitled to the whole fund, to the exclusion of all after-born children. (*z*)

But the rule above stated may be varied and controuled by expression or implication. Where a legacy is given to A. for life, and at his death to the children of B., this is considered as a bequest to the children of B. whether born during the lifetime of the testator or after his death: but, still for the sake of the convenience of fixing and ascertaining the interests and

(*u*) Coleman *v.* Seymour, 1 V s. 209.

(*x*) Horseley *v.* Chaloner, 2 Ves. 83.

(*y*) Hill *v.* Chapman, 3 Bro. C. C. 391.

(*z*) Doe on dem. Stewart *v.* Sheffield, 13 East. 533, 535. Doe *v.* Clarke, 2 H. Bl. 399. Roberts *v.* Higman, 1 Bro. C. C. 532.

claims of parties, and enabling executors to liquidate their accounts, children born after the death of A. are excluded. (*a*)

A legacy given to A. for life, and at the death of A. to his children, is considered as embracing all the children of A., whether born before or after the death of the testator; and a bequest of a sum to the children of A., without more, if A. has not any child either at the time of making the will, or the death of the testator, has been held as extending to any after-born children of A. (*b*)

If a testator bequeaths to trustees in trust for all the children of A., "born or to be born, share and share alike," such bequest will include those born after the death of the testator, as well as those born in his lifetime; and though until the death of A. the division cannot take place because the shares cannot be finally ascertained, yet the interests vest in the children living at testator's death liable to be divested as to so much as will on A.'s death let in the after-born children to an equal participation. (*c*) So a bequest to A. and all the other children hereafter to be born of B., will embrace the children of B. who shall come into being after the testator's death. (*d*)

If a bequest be made to the children of A. as they severally attain the age of twenty-one years, share and share alike, all the children living at the period when the eldest attains that age are comprehended; and then the amount of the shares is fixed; the time of distribution being declared by the testator in express terms has been held to exclude all who may afterwards come into existence. (*e*)

(*a*) Attorney General *v.* Crispin, 1 Bro. C. C. 386.

(*b*) Weld *v.* Bradbury, 2 Vern. 405. and see Haughton *v.* Harrison, 2 Atk. 329.

(*c*) Defflies *v.* Goldshmidt, 1 Meriv. 417.

(*d*) Gilbert *v.* Boorman, 11 Ves. J. 238.

(*e*) Walker *v.* Shore, 15 Ves. J. 122. and see Prescott *v.* Long, 2 Ves. 690. Whitbread *v.* Lord St. John, 10 Ves. J. 153.

And if a legacy be given to A. for his life, and after his death to his children, as they severally attain the age of twenty-one, share and share alike; upon a child of A. coming first of age after the death of A., the shares are ascertained: but if there be a child of age before the death of A., the shares are immediately ascertained and fixed at his death.(*f*) The period of distribution is the point of time limited by the exigency of the case for the ascertainment of the shares. Acccordingly, if a testator gives a legacy over to children on a future contingent event, the happening of the event is the period for ascertaining among what children the legacy is to be divided. Thus a testator devised his estate to trustees and their heirs, to the use of H. his daughter for life, and after her decease, without issue, in trust to sell and divide the money equally between all and every the children of his sister E. the wife of B., and of his sister M. the wife of G. at their respective ages of twenty-one: the sisters had each of them several children born in the lifetime of the testator; and E. had a daughter born about eleven months after the testator's death, but in the lifetime of H. the daughter, who afterwards died without issue. Sir Thomas Clarke, Master of the Rolls, was clearly of opinion that such after-born child was entitled. (*g*)

Thus the rule is settled that where the fund is given to be enjoyed at a future period, all persons born before that period, and answering the description when the period arrives, will be entitled.(*h*) And further that if a bequest be made to one for his life, and after his death to a class of persons, as children, &c. all persons answering such description at the testator's death, and before the time for the division of the fund, that is, at any

(*f*) Walker *v.* Shore, 15 Ves. J. 122.

(*g*) Bartlett *v.* Hollester, Ambl. 334. 1 Bro. C.C. 530. n. and see Ellison *v.* Airy, 1 Ves. 111. Hall *v.* Hewer, Ambl. 203. and Sansbury *v.* Read, 12 Ves. J. 75.

(*h*) Delmare *v.* Rebello, 3 Bro. C.C. 446.

time during the life of the tenant for life, will be entitled; and the representatives of deceased persons who have answered the description at and subsequent to the testator's death, will be entitled, in right of such representation, to share with those legatees who shall be living at the death of the tenant for life. (*i*)

But though it is clear that if the bequest be to the testator's children, or to the children of B., without 'more,' the bequest takes effect at the death of the testator, which is the time for ascertaining the objects; so that the children of B., born after the testator's death, are excluded; still, however, if a contrary intention is shewn by implication from the context, such intention will controul the rule.

As, in Mills *v.* Norris, (*k*) where the fund was meant to accumulate for the benefit of all the children of the persons named. And where the residue was bequeathed to the children of A., share and share alike, with a limitation over on failure of A.'s issue: it was held, that all the children which A. should have would be entitled equally; and that the shares of such as were in being at the testator's decease should vest, subject to be divested by the subsequent birth of children to A. so as to let them in to equal shares with the children previously born. (*l*)

Upon the whole, therefore, we may safely conclude that whenever words are used to designate a class of persons to take under a description, and not as individuals, and a period of distribution is indicated by expression or implication, such period must also be the period for ascertaining the persons to be benefited under such description.

A sum of money was bequeathed to purchase stock, the interest to A. for his life; then to the testator's brother W.; at his decease to S. one of the sons of W.; and

(*i*) Devisme *v.* Mello, 1 Bro. C. C. 537. Middleton *v.* Messenger, 5 Ves. J. 140. Crone *v.* Odell, 1 Ball and Beat. 449.

(*k*) 5 Ves. J. 338.

(*l*) Sheppard *v.* Ingram, Ambl. 448. and see 4 Ves. J. 287.

at his decease, if before his coming of age, to be divided among his brothers equally; and S. died in the lifetime of his father W., and in the lifetime of the testator, leaving at the time of his death two brothers, the only sons of W., at the time of the testator's death; but W. had another son A. born after that event; Lord Thurlow held, that the intention of the testator appeared to be to make an aggregate description of a part of the family of W., by the name of the brothers of S., as if he had used the words 'male children of W.,' and declared that A. being born before the time of distribution, was entitled to a share of the money so settled. (*m*)

And as words usually denoting individuals may, by the context, be made to imply an indeterminate number or class by description, as in the case last cited; so if a testator to words descriptive of a class add words of distinction by which he shews himself to intend individuals living at the time of the making of his will, his bounty will be confined to the persons so designated. As where a testator bequeathed a sum to the *six* children of A., who had six children at the time; and another child was born after the date of the will, but before the making of the codicil, whereby the testator confirmed his will: the seventh child was held not entitled to share with the six. (*n*) And the construction was the same where testator had mistaken the number. (*o*) So where the bequest was to the children of A. by name. (*p*)

But where the objects of a testator's bounty are indicated by words descriptive of an indefinite class, to induce the Courts to restrict the bequest to individuals living at the date of the will, there must be strong in-

(*m*) Devisme *v.* Mello, 1 Bro. C. C. 537.

(*n*) Stebbing *v.* Walkey, 2 Bro. C. C. 85.

(*o*) Sheer *v.* Bishop, 4 Bro. C. C. 55. and see Ackerman *v.* Burrows, 3 Ves. and Beam. 54.

(*p*) Eccard *v.* Brooks, 2 Cox. 213. Crone *v.* Odell, 1 Ball and Beat. 449. Doe *v.* Sheffield, 12 East. 537. n. (a).

ferences of such intention deducible from the context.

Even where the language in grammatical propriety has been applicable only to the children living at the time of the bequest; yet where the general import of the will has pointed to a class or description of persons; the construction has been in favour of those born after the date of the will, and before the death of the testator.

Thus where the devise was to J. R.'s children, to every child he *hath* by E. his wife; Sir R. P. Arden, Master of the Rolls,, construed the word *hath* as speaking at the time the will took effect, so as to let in the children born after the will, and before the death of the testator. (*q*)

Where a testator, after giving to certain persons by name, has added an erroneous description, as where he has bequeathed to A., B., and C., calling them the legitimate children of D., whereas they were illegitimate: effect has nevertheless been given to such disposition, the description being considered as superfluous; for *utile per inutile non vitiatur*. (*r*)

Effect of a devise to younger children.

Under a bequest to younger children, the same rule applies as we have above referred to when treating of the bequests to children generally. All such as answer to the description who come into existence after the time fixed for the ascertainment of the objects and the division of the fund are excluded. (*s*)

In virtue of such bequest to younger children, a daughter, though the eldest child, will be entitled, where the family estate is engrossed by the eldest son, so as to leave such daughter and eldest child in the

(*q*) Ringrose *v.* Bramham, 2 Cox. 384. and see Sleech *v.* Thorrington, 2 Ves. 561.

(*r*) Standen *v.* Standen, 2 Ves. J. 589.

(*s*) Gravers *v.* Royle, 1 Atk. 509. Horsley *v.* Challoner, 2 Ves. 84. Loder *v.* Loder, *ib.* 532. Teynham *v.* Webb, *ib.* 206. and see Hall *v.* Hewer, Ambl. 204. Bowles *v.* Bowles, 10 Ves. J. 177.

same want of provision with the rest of the children.

And if the youngest child being a son takes the family estate, he will not be entitled under such bequest in favour of the younger children. (*t*)

We are to remember, however, that this as a rule of construction has no place where the legacy comes from a stranger; it applies only to the case of a bequest from a parent, or a person standing *in loco parentis*. (*u*)

The eldest child will be excluded by the description although he does not take the family estate; (*x*) and if there be an only child he will take under a bequest to the younger children or youngest child, if born within the time specified for the gift to operate. (*y*) But under a bequest to daughters a younger son cannot take though unprovided for. (*z*)

SECT. V.

What Words and Phrases carry the whole Estate.

The word 'heirs' necessary to carry the inheritance in a grant.

BY the law of England, in the conveyance of real estates, words of limitation are required to the donation or grant, for the creation of an estate of inheritance. Thus Lord Holt, in the Countess of Bridgewater's case, (*a*) in speaking of the construction of the word *estate*, said, that 'most certainly in grants it would not pass a fee, because the law appoints that, let the intent

(*t*) Beale *v.* Beale, 1 P. Wms. 244. Northey *v.* Strange, *ib.* 342. Butler *v.* Duncombe, *ib.* 451.

(*u*) Hall *v.* Hewer, Ambl. 204.

(*x*) Bowles *v.* Bowles, 10 Ves. J. 177.

(*y*) Emery *v.* England, 3 Ves. J. 232.

(*z*) Matchwick *v.* Cox, 3 Ves. J. 611.

(*a*) 6 Mod. 106.

of the parties be ever so fully expressed and manifested in grants, without the word *heirs* a fee shall not pass.(1) If a feoffment,' continued that great judge, ' be made to I. S. *to have to him in fee-simple*, which words can have no other sense than to pass an inheritance, an estate only for life shall pass; and yet *fee-simple* in pleading is that which describes the inheritance, as *seisitus in dominico suo ut de feodo.*' It stands also upon the authority of Littleton, (*b*) that " if a man would purchase lands or tenements in fee-simple, it behoveth him to have these words in his purchase, ' to have and to hold to him and his heirs;' for these words ' his heirs' make the estate of inheritance. For if a man purchase by these ' to have and to hold to him for ever;' or by these words ' to have and to hold to him and his assigns for ever;' in these two cases he has but an estate for term

(*b*) Sect. 1.

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(1) The Reader will find in Co. Litt. 9. b. many instances in which a fee will pass by deed or grant without the word *heirs*: but they are all exceptions which prove the rule. Thus, if a father enfeoff the son to have and to hold to him and his heirs, and the son enfeoff the father as fully as the father enfeoffed him, by this the father hath the fee-simple. So by the ancient law gifts in frank marriage, or for the consideration of marriage, carried the inheritance without the word *heirs*. Corporations aggregate, which in judgment of law never die, take the fee without the word *successors* in the grant to them. And for the same reason, because the king never dies in judgment of law, a grant to him by deed enrolled passes the fee to him without the words *heirs* or *successors*. If one coparcener or joint-tenant releases to the other, or, if there be three, and one releases to one of the others generally, and without the word *heirs*, the fee passes. A fine *sur conusance de droit come ceo*, &c. by which it is implied that there was a precedent gift in fee, will carry the fee without words of limitation. And so, by a common recovery, the recoveror recovers the fee-simple without the word *heirs*. By those releases also which work by extinguishment the whole estate may pass without words of inheritance; as where the lord releases to the tenant of the land all his right, &c. the seignory, rent, &c. are extinguished for ever, without the word *heirs*. And it is said that if land be conveyed by bargain and sale enrolled for a consideration in money, which reaches to the whole estate, the fee-simple passes, for the conveyance works by contract and by the use created. See Vin. Abr. title Estate, (K 2,) and (L.)

of life; for that they lack these words 'his heirs,' which words only make an estate of inheritance in grants."

Upon the same authority it stands (*c*) that before the statutes 32 and 34 H. 8. where, by the custom of ancient boroughs and cities, lands and tenements were devisable by testament, the great rule prevailed, that the will should be performed according to the intent of the devisor; and therefore if, before the statute taking away the necessity of attornment, (2) a man, seised of a rent-service or rent-charge, devised such rent or service to another, the devisee was competent to distrain the tenant for the rent or service in arrear, without any previous attornment from such tenant: for if the effect of the gift were to depend upon the attornment of the tenant, perhaps the tenant might never attorn, and then the will of the devisor would never be performed. "So," says the same venerable writer, "if a man deviseth such tenements to another by his testament *habendum sibi in perpetuum*, and the devisee enter, he hath a fee-simple *causa qua supra*." It was the maxim of the *common law*, and not, as has been sometimes said, (*d*) a principle arising out of the wording of the statute of Wills, that *ultima voluntas testatoris est perimplenda secundum veram intentionem suam*.

But it is equally a fundamental rule in respect to the operation of wills of land that the intention must be disclosed either by expression or clear implication, to carry the inheritance; and this arises from the peculiar character of a will according to the law of England, which considers it as an appointment to uses in the nature of a conveyance; and capable, as such, of operating only upon the real property which the testator has at the time. In analogy, therefore, to the case of a conveyance, the devisor must mark his intention by expression, or some positive ground of inference, in

(*c*) Lib. 3. c. 10. sect. 585, 586. of Attornment.
(*d*) See *ante*.

(2) The necessity of attornment was taken away by statute 4 and 5 Ann. c. 16. and the efficacy by statute 11 Geo. 2. c. 19.

the instrument itself; that is, either by a form of limitation, or by words amounting to a virtual declaration of his will.

What shall amount to such virtual declaration of a testator's will is not established on any system of rules; for no rules can anticipate the infinite variety of possible cases which may turn upon this point. The rule of the greatest general certainty is this; that the construction of every will is to be made with reference to the whole, as far as it can be; and to be grounded upon a consideration of all the indications of intention, which can be gathered from the context. A doctrine which necessarily, to a certain degree, renders every case upon wills an individual case, and not to be used as a precedent but with great caution.

In the Commentary upon the First Section of his author, Lord Coke has stated by way of example several cases, to shew where estates of inheritance may pass in wills without words of formal and regular limitation. As if a man devise lands to another in perpetuity, or to give, or to sell, or in fee-simple, or to him and his assigns for ever. (3) The case he puts of the devise of twenty acres to another, for which the devisee was to pay to the executors ten pounds, which was held to give the devisee the fee, upon the ground that the devise might otherwise be a detriment to him rather than a benefit, as he might die before any profit could be derived from it, is an example of the rule that every testator is to be considered as intending a benefit to the object of the gift.

What words in a will are equivalent to a limitation to the heirs.

A devise to a man and his successors (*e*) will give the

(*e*) 2 Roll. Rep. 399.

(3) The dictum in Perkins, sect. 557. that if lands be devised to J. S., to hold to him and his assigns he will take by these words, a fee, is clearly not law, and is contrary to Lord Coke, who says in the passage to which we have been referring, that if a devise be to a man and his assigns, without saying *for ever*, the devisee hath but an estate for life, Co. Litt. 9 b. And if the devise be to several, equally to be divided between them and their assigns, it carries only an estate in common for life.

fee, and so will a devise to a man and to his blood; for the blood runs through the collateral line, as well as the lineal:(*f*) but a devise to one *et semini suo*, or, (*g*) it seems, to his posterity, would create an estate tail. (*h*) Nor is any particular form of expression necessary to the effect of the devise; for if a testator *releases* by his will to I. S. and his heirs, I. S. will take the fee. (*i*)

Whether the devise imports all that the testator has, or confers the entire dominion over the thing given, it is the same in effect.

And whether the phrase used by the testator expresses the whole interest belonging to himself, or the entire dominion and enjoyment of the thing by the devisee, the same effect is produced. Thus, it is the same thing whether a testator gives 'all his estate,' 'all he is worth,' (*k*) 'whatever he has in the world,' (*l*) 'all his inheritance,' (*m*) 'all his right, title and interest,' (*n*) 'all his part, share, and interest,' (*o*) or, devises his lands to I. S., 'to give, sell, or do therewith at his will and pleasure;' (*p*) or 'for his own use and to give away at his death to whom he pleases;' (*q*) or 'to dispose thereof at his free will and pleasure;' (4) in all of

(*f*) Co. Lit. 9 b. (*g*) *Ibid.*

(*h*) Attorney General *v.* Bamfield, 2 Freem. 268. Vin. tit. Dev. (L. a.)

(*i*) And. 33. and see 1 Lord Raym. 187.

(*k*) Huxtep *v.* Brooman, 1 Bro. C. R. 437. But *all*, of itself, does not imply all the testator's interest. See Bowman *v.* Milbranck, 1 Eq. Ca. Abr. 208.

(*l*) Hopewell *v.* Ackland, Com. 164.

(*m*) Widlake *v.* Harding, Hob. 2.

(*n*) Cole *v.* Rawlinson, 3 Bro. P. C. 7.

(*o*) Andrew *v.* Southhouse, 5 T. R. 292.

(*p*) Bro. tit. Dev. pl. 39. Co. Litt. 9 b.

(*q*) Timewell *v.* Perkins, 2 Atk. 102.

Difference between the phrase 'to be freely enjoyed' and 'to be freely disposed of.'

(4) Goodtitle *v.* Otway, 2 Wils. 6. and see Maskelyne *v.* Maskelyne, Ambl. 75. But there is a clear distinction between the expression in the text which implies a perfect dominion of the estate, and the phrase, 'to be freely possessed and enjoyed,' which in the case of Goodright d. Drewry *v.* Barron, 11 East. 220. was held to carry to the devisee nothing beyond an estate for life. The import of these words might be satisfied by being understood to mean 'freely during life,' or 'free from all charges,' or 'free from impeachment of waste.' The testator *might* mean more: but the Court ought not to

which cases the fee-simple would undoubtedly pass to the devisee.(5)

In the construction of wills, words must receive a natural interpretation, and be understood in their received sense. Thus in the case of Green *v.* Armstead, (*r*) where A. devised his house and land in C., to his son B. for his life, and then to remain to D. the son of B., except B. *purchased* another house with so much land, and of the same value, as the said house and land

(*r*) Hob. 65.

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give to the words a more extended meaning than is necessary against the heir. In the above case it was observed by Le Blanc, J. that if the lands had been given to the devisee 'freely to be disposed of,' the intent would have been shewn to pass the fee. The case was distinguishable from Loveacres *v.* Blight, Cowp. 352. where similar words were held to pass the fee; for in that case, there being a charge on the devisees which might last longer than their lives, there was a ground for understanding the words of the devise in the largest sense they would bear; otherwise the benefit intended by the testator might be unavailable.

Though it may be looked upon as settled that the devise of an estate, generally, to be at the disposal of the devisee, gives the fee-simple; yet where the estate is expressly limited to the devisee *for life*, with a power of disposition, the devisee takes no more than a life-estate with a power annexed. If the party dies without having executed the power, the interest ceases with the life, and no one can take by transmission through the devisee, 3 Leon. 71. 4 Leon. 41. Tomlinson *v.* Dighton, 1 P. Wms. 149. Reid *v.* Shergold, 370. and see Bradley *v.* Westcott, 13 Ves. J. 445. and such a power must be exercised in conformity with the intention expressed in the terms of its creation. Thus in Doe d. Thorley *v.* Thorley, 10 East. 438. where a man devised all his freehold estate to his wife during *her natural life*, and also *at her disposal afterwards to leave it to whom she pleased*, the Court adjudged that the word *leave* confined the authority of the devisee for life to a disposition by her will only. In Tomlinson *v.* Dighton, the power of disposal annexed to the life estate was unrestrained.

(5) Where the property is personal, the words 'all I am possessed of' and such like expressions, where they stand uncontrouled by the context, will have the effect of passing all the personal estate which the testator has at his death, and not only what he possesses at the date of the will. 5 Ves. J. 816.

in C. for the said D. his son; and then B. might sell the house and lands in C. as his own; it was held that D. took a fee in the house and lands in C., as B. did not make any purchase of any other lands; for the word *purchase* imported, in common speech, an absolute purchase in fee. And therefore if a man directs his executors to *purchase* land for his son, no doubt, says the case, it will import a fee-simple.

Appointment of a person to be heir is a gift of the fee-simple.

And though, as has been above remarked, a will, according to the law of England, is a species of conveyance, differing in that respect from the Roman will, which is rather the appointment of an heir; and though, in propriety of speech, no one can be truly the heir by our law, but he whom the law makes so; yet, says the same venerable Reporter of the case last cited; "There is an heir by appellation and vulgar acceptance, which imitates the state of a true heir. And, therefore, if by my will I appoint that I. S. shall be the heir of my land, he shall have it in fee; for such estate as the ancestor hath, such estate he is to inherit."(*s*) So in a subsequent case, where the words of the will were, "I make my cousin G. B., my sole heir and executor;" it was held not only that the lands passed without being mentioned, but a fee-simple in the lands. (*t*)

If land is devised generally, and the devisee of the land is charged, in respect thereof, with the payment of a sum of money, he takes fee.

We have seen above, that one of the cases put by Lord Coke, in commenting on the first section of Littleton, wherein an estate in fee might be passed by a will without the word *heirs*, was that of a devise to B. paying a sum of money to his executors.

Accordingly it has long been settled, that where land has been given by a will, with a direction that the devisee shall pay a gross sum out of it, the devisee thereby takes the fee-simple; and this, although the sum so directed to be paid be below the value of the land for one year; for, as has been before observed, one of the pri-

(*s*) Spark *v.* Purnell, Hob. 75.; and see the record in Winch's Entrees, 407.

(*t*) Style 307, 383.

mary rules in the construction of wills, is this; that every devise shall be intended to carry with it a benefit; and if the devisee in the case supposed took only an estate for life, he might die before he could be compensated out of the land; and so the devise, instead of a benefit, might bring a loss to him.

Thus, in Collier's case, (*u*) where a testator gave lands to his brother, paying to one person twenty shillings, and to others small sums, amounting to forty-five shillings all together, the land being of the value of 3*l.* per annum, it was adjudged that the brother took an estate in fee. (*v*) So, if I devise my land to I. S., in consideration that he will release 100*l.*, which I owe him, to my executor, the devisee, upon releasing the debt, has the fee-simple for the same reason. (*x*)

So if such devisee is charged with the payment of debts and legacies.

For the same reason, also, if I devise my lands charged with the payment of my debts and legacies, the fee will pass to the devisee. Thus, where A., seised of lands in fee, made his will, and gave his cousin B. 20*l.*, to be paid out of his lands within one year; and after other legacies, gave all his lands to R. generally; it was adjudged that R. took an estate in fee-simple. (*y*) And where a testator devised by the following words, "All the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expenses being thereout paid, I give, devise, and bequeath unto my sister J. D.; and constitute and appoint her my executrix and residuary legatee of this my will;" Lord Kenyon said, that the first words alone were not sufficient in law to carry the fee: but that he relied on the words immediately following, —"My legacies and funeral expenses being thereout paid," as sufficient for that purpose; for the fund which was to answer these purposes ought to be as ample as

(*u*) 6 Rep. 16.
(*x*) Bendl. 15.
(*v*) 3 Rep. 21. a. 1 Roll. Abr. 834.
(*y*) Freak *v.* Lee, 2 Show. 38.

possible. These charges extended to, and were to be taken out of, the property which was before given to the residuary legatee; and if that devise did not comprise the whole of the devisor's estate, the interest as well as the land, the legacies and funeral expenses might not be paid. (z)

In a subsequent case decided by the same learned Chief Justice, the doctrine was more distinctly expounded.

The devise was in the following words:—"I give and bequeath my freehold house, with the appurtenances, &c. and all the furniture thereto belonging, to E. Gibson, whom I make executrix of this my last will, she paying all my just debts and funeral expenses and legacies beforementioned, in twelve months after my death. I also leave to the said E. Gibson all the rest and residue of my personal estate." The Judge before whom the cause was tried, being of opinion that the devisee took a fee by reason of the words, "the paying all my debts, &c." nonsuited the plaintiff. And on a motion to set aside the nonsuit, Lord Kenyon thought the direction perfectly right; observing that, in cases of this kind, the question has always been, whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case the devisee only takes an estate for life, but in the latter he takes the fee; otherwise he might be a loser by the devise. The devisee, in the case under consideration, was bound to pay the debts and legacies at all events, and the charge was thrown on her in respect of the real estate. (a)

So also where the devisee is charged with a perpetual annual payment.

Where lands are devised with a direction that the devisee shall make a *perpetual* yearly payment thereout,

(z) Doe d. Palmer and Others v. Richards, 3 T. R. 356.

(a) Doe d. Willey v. Holmes, 8 T. R. 1. See also Goodtitle d. Paddy v. Maddern, 4 East. 496. The distinction has turned in all the cases on this—whether the debts, &c. were merely a charge on the estate devised, or a charge on the devisee himself, in respect of such estate in his hands.

if the devisee were not to take an estate commensurate with the charge, he could not fulfil the testator's intention. Accordingly where one devised lands to C. his younger son, and directed that C. should pay annually to the elder son B. *and his heirs,* three pounds; it was resolved that this was an estate in fee. (*b*) So in another case, where lands were devised to J. and S., who were to pay yearly to the Merchant Tailors' Company in London six pounds ten shillings, it was resolved that the devisees took a fee-simple by reason of the annual payment, without any regard to the greatness or smallness of the sum; for, as the charge continued for ever, the estate must continue so too, as without the estate the charge could not continue. (*c*)

Or with the payment of an annuity for the life of another.

And although the annual payment to which the land is subjected is to continue only for the life of another, the devisee of the land must have the fee; for otherwise the annuity might fail before the death of the person for whom it was intended. Thus where a testator, after giving several legacies, gave to Mary Ramsey the sum of twenty shillings a-year, for and during her natural life, to be paid by his executors; and gave his two yardlands, with his house and homestead, and all the residue land remainder of his goods, chattels, and personal estate, to Thomas Allen, he paying his debts, legacies, and funeral expenses, and made Allen his executor; the devise to Thomas Allen was adjudged to be of an estate in fee in the lands, because the annuity was given to Mary Ramsey, for her life, to be paid by the executor, which must have an estate to support it. And, as the devises to Allen followed each other immediately, they must be construed as one clause, so that the payment of debts and legacies was charged on the real as well as the personal estate. (*d*)

(*b*) Shallard *v.* Baker, Cro. El. 744.

(*c*) Webb *v.* Hearing, Cro. Jac. 415., and Smith *v.* Tendall, 11 Mod. 90. 2 Salk. 685.

(*d*) Goodright *v.* Allen, 2 Blackst. 1041.

And in another case, where a testator gave his two copyhold tenements to Sarah Boreham, she paying thereout forty shillings a-year to her sister Elizabeth Boreham, though the gift of the annuity to E. B. was not expressed to be for her life; yet, there being reasons enough afforded by the other parts of the will for construing it to be so intended, it was held that the annuity to Elizabeth made it a devise in fee to Sarah. (*e*)

By a devise to trustees for purposes which require the fee, the fee passes without words of limitation.

Upon a principle similar to that which is the true solution of the class of cases just above considered, it is held, that if lands are devised to trustees, for purposes which require them to have the fee-simple in them for the performance thereof, the estate in fee will pass without any words of limitation; for, as Lord Hardwicke has observed, it has often been determined that, in a devise to trustees, it was not necessary that the word *heirs* should be inserted to carry the fee at law; for if the purposes of the trust could not be satisfied without having a fee, courts of law would so construe it. (*f*)

Of chattels real a general devise, without any words of limitation or declaring any estate, passes the whole interest of the devisor. (*g*) If such property be devised to another for his life, and no intention appear to dispose of the whole interest, a possibility of reverter is left in the executors of the testator, to take effect upon the death of the devisee within the term. But a devise in a form of limitation which would pass the inheritance in tail, if it were a freehold estate, will carry the absolute interest in a term or chattel interest. (*h*) For the remainder of a term cannot be made

(*e*) Baddeley *v.* Leppingwell, 2 Burr. 1531. Wilmot, 223. and Goodright d. Baker *v.* Stocker, 5 T. R. 13.; same point determined accordingly, and see Andrew *v.* Southouse, 5 T. R. 292.

(*f*) Gibson *v.* Montfort, 1 Ves. 485. Shaw *v.* Wright, 1 Eq. C. Abr. 176., and see Oates *v.* Cooke, 3 Burr. 1684. Chapman *v.* Blisset, Ca. temp. Talb. 145.

(*g*) Fenton *v.* Foster d. Dyer, 307. a. Roll. Abr. 831.

(*h*) Seale *v.* Seale, 1 P.Wms. 290. Butterfield *v.* Butterfield, 1 Ves. 133, 154.

to depend upon a possibility so remote as the failure of issue, and therefore the interest must stop with the first taker.

As to the force and operation of the preamble, or introductory words in a will.

With respect to the force and operation of the preamble and introductory words in a will, after some fluctuation it is at length clearly settled, that although they make profession of disposing of all the testator's property in the fullest manner, they will not operate to carry the words of the devising clause beyond their legal sense and signification. If the testator commences his will with saying, "as touching the disposition of all my temporal estate,"(6) this will not of itself cause a devise of a house to A., without any words of limitation, to be construed an estate in fee-simple. (*i*) Where, however, the words used in the devising part of the will, though not proper and technical, were yet sufficient to carry the interest contended for; as, where a testator, after saying "as to all my worldly substance," by the residuary clause of his will devised to his mother *all the remainder and residue of all his estate and effects both real and personal,* the mother was held to take the fee. (*k*) But in a subsequent case, where a testator devised thus, "as to all such *worldly estate as God has endued me with,* I give and bequeath as follows:—I give and devise all that my freehold messuage and tenement lying in G., together with all houses, &c. and appurtenances whatsoever, belonging to the same, to M. R., G. R., and T. R., my sister's sons, equally;" and then, amongst

(*i*) Frogmorton and Wright *v.* Wright, 2 Blackst. 889.
(*k*) Hogan *v.* Jackson, Cowp, 290.

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(6) In the case of Tanner *v.* Morse, Ca. temp. Talb. 284. it was contended that these words *temporal estate* in the introductory clause, in a strict sense, related only to estates of a certain duration, and that were to continue for a time only: but the Chancellor treated this as a very fallacious construction, the word *temporal* being the same as *worldly*, and used in opposition to the word *eternal.* There could not be a better specimen of the vain disputations which sometimes find their way into Courts of justice.

other pecuniary legacies, gave the sum of ten shillings to his heir at law; Lord Mansfield, after saying that he suspected extremely that the testator meant to give his nephews a fee in the premises, for he had no other landed property, and had given a disinheriting legacy to his heir at law, agreeably to the vulgar notion taken from the Roman law, that the heir is to be cut off with a shilling, (7) yet declared it to be impossible to find words in the will before him sufficient to control the rule of law. Whatever the testator might intend, the misfortune was that *quod voluit non dixit.* The testator had not said that he meant *to dispose of* all his worldly estate; and there were no words that would connect the devise of the lands in question with the introduction so as to pass the whole interest: therefore, the devisees would only take a life estate. (*l*) In the subsequent case of Right *v.* Sidebotham, (*m*) the same Chief Justice declared himself bound by the decision of the case last-mentioned; and accordingly, with the concurrence of the other Judges, decided in the same way.

In Ibbetson *v.* Beckwith, (*n*) where considerable stress was laid by Lord Talbot on the introductory words, we are to observe that the testator devised by the word *estate,* the force of which word we have already discussed. And the introductory clause contained words which Lord Mansfield treated in the case of Denn *v.* Gaskin, as very material; for there the testator expressed his intention *to dispose of* his worldly estate. But in the case of Frogmorton *v.* Wright, already cited, (*o*) where the writ begun with the words "as touching the *disposition of all* my temporal estate," no

(*l*) Denn d. Gaskin *v.* Gaskin, Cowp. 657.
(*m*) Dougl. 759.
(*n*) Ca. temp. Talb. 157.
(*o*) *Vid. sup.* 455.

(7) Vid. Vin. c. 2. tit. 18. *De inofficioso Testamento.*

attention was paid to this distinction, nor has it been treated since with any regard.

And although the word *estate* may be used by a testator in the devising clause of his will; yet if there is ground for inferring from the whole of the contents that the real estate was not intended to be devised, the general introductory words, though embracing in the fullest manner the property, *both real* and personal, will not overrule the inferences deducible from the whole tenor of the instrument. As, when a testator begun his will thus, "as to all my estate and effects both real and personal," and then proceeded, by a residuary clause, to give all the rest of his estate and effects, of what nature soever, to A. and B., their *executors and administrators,* in trust to add the *interest to the principal,* and so to accumulate the same, it being his will that the residue should not pass but at the time and manner as the principal sum of 4000*l.* (before given to A. and B.) was directed to be paid, it was held that a house, the only freehold of which the testator was seised, did not pass by the will; and Lord Kenyon observed that the testator set out in the beginning of his will, as if he meant to dispose of all his property. But though these general words would have shewn his intention if there had been subsequent words in the will to carry that intention into execution, as had been said by Lord Talbot in Ibbetson *v.* Beckwith, it had been held in a variety of cases that alone they are not sufficient to dispose of a fee; and, by adverting to the residuary clause, there were no words to pass the estate in question. The testator only meant that that should extend to his personal estate. It was given to trustees, their *executors and administrators,*—technical terms applicable to *personalty.* But "I rely," said his Lordship, "on the following words of the clause, 'to add the interest to the principal so as to accumulate the same.' The interest and principal were to make one consolidated sum of the same nature, and are terms wholly inapplicable to real estate. Seeing, therefore, that there

is nothing in the residuary clause to pass this estate, and that there is nothing in the will to make it necessary for the trustees to take it to perform any trust in them, the heir at law stands intrenched in his right as heir, and cannot be removed from it."

By the later cases, the importance of the introductory clause appears to have been less considered than formerly.

The importance of the introductory clause, as manifesting an intention of complete and ultimate disposition, has been gradually declining in Courts both of law and of equity. In the case of Goodright d. Baker *v.* Stocker, (*p*) Lord Kenyon laid a very slight stress upon it, observing that, though the general introductory words would have *some* effect in the construction of the subsequent devises, as had been said by Lord Talbot in a case before him, they could not of themselves have carried the fee. In another case(*q*) Lord Ellenborough, in adverting to the effect of this clause, observes, that the construction might be considered as *in a degree* aided by the introductory words of the will respecting his worldly and temporal estate, &c. which, said his Lordship, "are allowed to have some weight in cases where the intention of the testator is doubtful, and where there are other words in the will to carry his intention into effect."

In the case of Goodright d. Drewry *v.* Barron, (*r*) which has been already cited for another purpose, the imbecillity of this introductory clause was still more marked. There the testator, after the introductory words "as touching my worldly estate, &c." devised a cottage, house, &c. to A. and his heirs, and also gave to B., whom he made his executrix, "all and singular his lands, messuages, and tenements by her freely to be possessed and enjoyed:" it was held that the latter words, being ambiguous, did not pass the fee against the heir, and that the word *estate* in the introductory clause could not be brought down into the latter distinct clause. With respect, said the Chief Justice, to the introductory words, it has been held in many cases

(*p*) 5 T. R. 13. (*q*) Doe d. Bates *v.* Clayton, 8 East. 147.
(*r*) 11 East. 220.

that they are not sufficient of themselves to carry a fee; but *juncta juvant:* And Mr. J. Le Blanc observed that the introductory words were a circumstance, *with others,* from whence the testator's interest might be collected.

Finally, in the case of Doe d. Wall *v.* Langlands, (*s*) it was said by Lord Ellenborough, C. J., that "very little inference of intention can be drawn from mere formal words of introduction, though we certainly find them in some cases called in aid to shew that a man did not mean to die intestate as to any part of his property; and the making a will at all may also be used as affording such inference."

Of the effect of the residuary clause.

The effect of the words usually employed in the residuary clause is deserving of some consideration. In Tanner *v.* Morse, (8) the testator devised in the following words: "As to my temporal estate, I bequeath to my nephew T. (the testator's heir at law), 50*l.*" Then, after several legacies, he concluded thus:—"And all the *rest and residue* of my estate, goods, and chattels whatsoever, I give and bequeath to my beloved wife M. C., whom I make my full and sole executrix." It was contended that as to the words "all the rest and residue of my estate," they must have *relation to something that went before;* and there was nothing disposed of in the will before that clause, but only some legacies charged upon the personal estate. Lord Talbot, however, decreed an estate in fee-simple to pass by the words of the will, considering the introductory clause followed by the devising words, as amounting to the same as if the testator had said, "I devise the rest and residue of all my temporal estate." And, indeed, it never has been doubted that if by necessary or fair construction

(*s*) 14 East. 372.

(8) Ca. Temp. Talbot, 284. Before Lord Chancellor King, and afterwards affirmed by Lord Talbot on a rehearing: reported in 3 P. Wms. 295. by the name of Tanner *v.* Wise.

the introductory words "as to all my worldly estate, substance, &c." are fairly to be construed as connected with the devising words that follow, the fee-simple passes under them; for then it is really a *disposition by*, and not merely an *introduction to*, the will.

How far the residuary words are to be considered words of relation.

It is observable that in the last-mentioned case, as it is reported in Peere Williams, Lord Talbot appears to have adopted the argument of the counsel, that *rest* and *residue* were mere words of relation, having a necessary reference to some property of the testator before-mentioned in the will.

But Lord Holt expressed a different opinion in the case so much above referred to, of the Countess of Bridgewater *v.* the Duke of Bolton, (*t*) wherein he said that it might be objected that the word *residue* was a word of relation, and therefore to be confined by its relation to something given before. But this he denied, and said, "Suppose a man gives some of his personal estate away by will, and in the same will gives the residue of his estate, real and personal, away, should not this pass the freehold as well as the rest of his personal estate? Surely there is no doubt of it." "And," said his Lordship, "considering the last clause of the will, whereby he orders these *rents*, in case of deficiency, &c. to be sold, and the remainder thereof, after the debts and legacies paid, to go to the Earl: I say, considering this clause, with other scattered clauses in the will, the rents thereby will pass. Some doubts have been made whether the word '*remainder* of my rent' be sufficient to pass these rents: because a *remainder* is a residue of something; so that if there be nothing sold, there can be no *residue* or *remainder*. But this depends upon the construction of the word *remainder*; —whether there be a necessity to sell to make a remainder. But I do not think that the word *remainder*, here, is to be taken for a *remnant of a totum*, when part is extracted from it; for if the rents are not sold, then

(*t*) See 6 Mod. 108.

they *remain* unsold, and the word *remainder* shall be understood of the rents remaining unsold. This word *remainder* made some dispute which lasted for above an age. It was a great question whether there could be a remainder of a thing created *de novo*, (*v*) and which never had been before. Since, a more reasonable construction has been made. If a man by deed grant a rent to A. and the heirs of his body, remainder to B. and his heirs, this is a good remainder."

Lords Holt and Talbot reconciled as to this point.

There cannot be a doubt, it is humbly apprehended, of the propriety of these observations of Lord Holt; which may be reconciled with those of Lord Talbot, above alluded to, by attending to the following distinction.

The words *rest, residue,* and *remainder,* are not to be considered as mere words of relation, when the question is, *what subjects* are included under them; for it seems clearly settled, not only that property of the testator not before mentioned by him will pass under the residuary devise, unless there is something in the will itself to limit and contract its compass to the extent of the descriptive words used, but property not distinctly in the contemplation of the testator at the time. Thus M. C. made her will, duly executed for passing freehold estates; and hereby gave, devised, and bequeathed all and every the real estates, which she was any ways seised of, interested in, or entitled unto, late the estate of W. N., to certain persons, in manner therein mentioned; and she gave to other persons other messuages, &c. by particular local descriptions: she then gave several pecuniary and specific legacies, and afterwards devised and bequeathed all the *rest* and *residue* of her estate, of what nature and kind soever, unto C. for her life, with limitations over to other persons. The testatrix died soon after making her will, seised of eight acres of freehold, and four of copyhold lands of inheritance, in the parish of Chertsey, which were the lands in question,

(*v*) 1 Sid. 285. Co. Lit. 241. a. note, (4). 298. a. note, (2).

and not particularly devised by the will. She had duly surrendered the copyhold to the use of her will. In this case there was no difficulty in construing the lands, of which there was no mention made in the will, as passing by the words "all the rest of my estate, of what nature or kind soever."

So also in the case of Goodright d. Earl of Buckinghamshire and Others *v.* Marquis of Downshire, (*x*) the Court recognized the principle laid down in many antecedent cases, particularly in Smith d. Davies *v.* Saunders, (*y*) that a residuary clause will extend to every *latent* reversion which the testator might have in him, unless it be expressly excluded by devise to some other person.

But when the question is, not as *to the particular parts of the property,* but as to *the quantity of interest,* which passes to the devisee by the residuary clause, it may frequently be of importance to consider the words 'rest,' 'residue,' and 'remainder,' in their relation to the things mentioned in the preceding parts of the will. For if these words are considered alone, without any aid from the introductory words of the will, or the descriptive words used in designating the property, they are incapable, of themselves, of passing the absolute interest.

Thus in the case of Canning *v.* Canning, (*z*) where the words were, "*all the rest, residue, and remainder,* of my messuages, land, or hereditaments whatsoever and wheresoever, unbequeathed after my just debts, legacies, and funeral expenses are paid, I give to my executors, in trust for my daughters, &c." it was adjudged that the executors took only a life estate; for the words "all the rest," &c. comprehended the particulars only, and not the estate. So where the words were "all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever and

(*x*) 2 Bos. and Pull. 600. (*y*) 2 Blackst. 736.
(*z*) Mosel. 240.

wheresoever, after payment of my just debts, I give, devise, and bequeath the same unto my wife S. C.; and I hereby nominate and appoint my said wife sole executrix of my will:" it was adjudged that the wife took only an estate for life. (*a*) And in the case of Doe d. Palmer *v.* Richards, (*b*) where the devise was of "all the rest, residue, and remainder of my lands, hereditaments, goods, chattels, and personal estate," it was admitted by Lord Kenyon that these words alone were not sufficient in law to carry a fee.

But where a testator makes a partial disposition of his interest in a thing, whether it be a chattel or hereditament, and afterwards devises or bequeaths the "*rest, residue,* and *remainder,*" &c. then these words may properly be considered as having a specific relation to what has gone before; and, standing in this light, they seem to have been always held to carry the whole of the testator's remaining interest. And thus Lord Holt and Lord Talbot may be reconciled by adverting to the difference between the relation which exists between an individual whole and its component parts, and that more general relation which exists beween the several particulars composing a numerical quantity. When *rest* or *residue* are used to signify this latter relation, the words import only the things devised: but when they denote the former species of relation, they imply the quantity of interest remaining in the testator.

Thus in Grayson *v.* Atkinson, (*c*) where a testator began his will thus—as to all my temporal estate wherewith it has pleased God to bless me, I give and devise the same as follows:—and then gave several legacies to A.; and directed him to sell all or any part of his real and personal estate for the payment of his debts and legacies; and concluded with giving, "all the *rest* and *residue* of his goods and chattels *real* and personal,

(*a*) Denn *v.* Mellor, 5 T.R. 558. (*b*) 3 T. R. 356.
(*c*) 1 Wils. 333.

moveable and immoveable, as houses, gardens, *tenements*, to A." without using the word *estate*, or any words of limitation, Lord Hardwicke, though he doubted at first, was afterwards clearly of opinion that A. took a fee in the realty.

So in Hogan d. Wallis *v.* Jackson, (*d*) where, after beginning with the usual introductory words, "As to all my worldly substance," the testator gave *to his* mother *his house and lands of G. for the term of her natural life, without the liberty of committing waste thereon*, and gave other lands to her in the same manner, and after several legacies and annuities, devised to his mother *all* the *remainder* and *residue* of *all* his effects both real and personal, which he should die possessed of, the mother, by the residuary clause, was adjudged to take the fee in the testator's fee-simple estates. (9)

In both the last-mentioned cases, we find the usual general introductory words: but as it has been settled that these words can only assist, and not enlarge, the succeeding devises, or enable them to pass more than the words themselves are equal to, it follows that these residuary words were considered as, of themselves, capable in law of carrying to the devisee the whole interest, when the context shews this to be the intention; and such intention appeared in these cases by the relation of the residuary words to a preceding partial disposition of the property.

Of the devise of a *remainder* or *reversion*.

In the case of Norton *v.* Ladd, (*e*) upon a devise to A. for life, and after her decease the whole *remain-*

(*d*) Cowp. 290. (*e*) 1 Lutw. 755.

(9) It was strongly contended that as the mother had a specific estate for her life, and that estate was made liable to impeachment for waste, such particular disposition to her was totally repugnant to, and inconsistent with, an intention to give her the absolute property in a subsequent part of the same will. But this argument was not suffered to prevail, and was considered by Lord Mansfield as answered by the decision of Ridout *v.* Paine. 3 Atk. 486.

der of the lands to B., it was held that a remainder in fee-simple passed. And that case has never been doubted.

And, upon a principle similar to that which has above been endeavoured to be explained it seems that when a testator has nothing but a *reversion* or *remainder* in fee in the land, and devises it as such, the whole interest passes to the devisee; for though the will may have made no previous devise of a partial interest out of the subject, yet the words "reversion, or remainder," naturally imply the quantity of interest remaining in the testator, after the determination of the antecedent estate or estates.

Accordingly, in the last cited case of Norton *v.* Ladd, it was said, that the devise of a *reversion* carried the fee. And where a testator devised thus—"I give to my son C. G. the reversion of the tenement my sister now lives in, after her decease; and the reversion of those two tenements now in the possession of J. C.;" Lord Hardwicke declared his opinion that the word *reversion* passed the fee. (*f*) "The interest," said his Lordship, "which the testator had in it, was the reversion in fee which he had in himself, expectant on those leases which he had granted, whether for life or for years. '*Reversion*' was the right of having the estate back again, when the particular estate determined: it was descriptive of the right of reverter, by way of eminence, that was in himself; consequently, there was no ground to split or divide it. Giving the reversion was giving the *whole* reversion, unless words are added limiting and restraining the interest."

Thus also, in the case of Cole *v.* Rawlinson, (*g*) Lord Treby observed that it had been lately adjudged in the Common Pleas, that when I. S., having a *remainder* in fee, devised all his *remainder* to I. N., a fee passed to the devisee. And where the Bell Tavern was settled upon A. for life, remainder to B. in tail,

(*f*) Baillis *v.* Gale, 2 Ves. 78. (*g*) 1 Lord Raym. 187.

remainder to A. in fee, and A. devised all the house called the Bell Tavern to B. without saying for what estate; it appears by a note in Viner, (*h*) that the fee was held to pass.

The cases wherein the word *estate* has occurred in the residuary devise, are improper examples of the force of the devising residuary words; since that term, of itself, embraces the absolute fee-simple *in* a will.

Of the different effects of the residuary clause, in respect to real and personal estate.

The effect of the residuary clause is very different in respect to real and personal estate. Which important distinction is clearly and fully stated by Sir William Grant, in the case of Cambridge *v.* Rous. His words are as follow: "The third question upon the will of S. is, whether the particular legacies, lapsed by the death of M., fell into the residue, and pass by the residuary clause; or belong to the next of kin, as undisposed of. It has been long settled that a residuary bequest of personal estate, (for it is otherwise as to real) carries, not only every thing not disposed of, but every thing that, in the event, turns out to be not disposed of. And this, not in consequence of any direct or expressed intention; for it may be argued, in all cases, that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given away from him: no, for he does not contemplate the case. The residuary legatee is intended to take only what is left: but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against every one except the particular legatee. The testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee. In the case of lapse of *real* estate, the heir at law takes: but in the case of personal property the residuary legatee is preferred either to the next of kin, or the executor.

It is, therefore, the settled rule of construction, that,

(*h*) 8 Vin. 209. tit. Dev. (L. a.) pl. 29.

as to personal estate, whatever is not effectually taken out of the bulk of the property falls into the residuum, and passes by the general bequest thereof. Nor does it signify whether the particular legacy becomes ineffectual by the death of the legatee in the testator's lifetime, or by the disposition itself being void in law.

In Brown *v.* Higgs, (*i*) one of the bequests of the will was void under the Statute of mortmain; and it was without difficulty determined that the subject of the void bequest passed to the residuary legatee: and to what was observed, as to the testator's not meaning to include in the residue what he imagined himself to have previously disposed of, it was said by the Master of the Rolls, that the same argument might be urged in the case of lapsed legacies; for no man supposes his legacies will lapse, or will not take place. And, in Shanley *v.* Baker, (*k*) in the same Court, the authority of Brown *v.* Higgs was recognized and confirmed. And again in Crooke *v.* De Vandez, (*l*) the particular phrase of "what remains" used by the testator, being held to be tantamount to the word *residue*, and to include every thing not already disposed of, personal estate, bequeathed upon a contingency too remote, was held to pass under them to the residuary legatee.

No difference in this respect as to personal estate, between specific and general legacies.

There is not any distinction as to this effect of the residuary bequest between specific and general legacies. Where a man by his will (*m*) gave and bequeathed all the *rest and residue* of his real and personal estate whatsoever, and wheresoever, and of what nature or kind soever the same might consist of, *not therein before specifically disposed of*, the general devise was held to comprehend *specific* legacies lapsed, upon the ground that the word *specifically* ought to be construed 'particularly;' The Master of the Rolls being of opinion clearly, that the testator was not to be interpreted as

(*i*) 4 Ves. J. 708. (*k*) *Ibid.* 732.
(*l*) 11 Ves. J. 330.
(*m*) Roberts *v.* Cooke, 16 Ves. J. 451.

meaning to die intestate with regard to all sums specifically bequeathed, and testate with regard to all pecuniary legacies.

Why a lapsed real estate does not pass with the residue.

But if a devise of *real* estate becomes ineffectual from lapse, it is considered by the law as undisposed of; and, having been separated from the residue at the time that the will had an incipient operation, in the nature of a conveyance, it cannot be brought again into it by a subsequent event. And where a testator manifests his intention by making an express disposition of a real estate, and such a disposition is void in law, still it will not pass inclusively in the residue, unless under special circumstances overruling the inference of intention to separate it from the residue. Thus in a case (*n*) where the testatrix, having four sisters, devised particular estates to them, with remainder to her own right heirs, and afterwards gave the residue, in a general residuary clause, to one of the sisters, and died, having no other real estate; upon one of the particular estates determining, it was held that the reversion did not pass by the residuary clause; for though the devise might not operate to make the heir of the testatrix take by purchase, (10) yet it was in the nature of

(*n*) Amesbury *v.* Brown, cited 2 Black. 739.

Of the devise to the heir—when he takes by the will—when by descent.

(10) Where the same estate is devised to the heir in quantity and quality, as he would have taken by descent if there had been no devise, the devise is void, and the heir will take by descent. But where by the devise a different estate is given from that which the law would give, the will prevails; as where a man devises to A. and B., his daughters and co-heirs, in fee: for instead of an estate in coparcenary, they take as joint-tenants, with survivorship. So, if the devise be to them, as tenants in common. And if a man devise to one of several coheirs of himself, in as much as one co-heir cannot take without the others by descent, the whole shall pass by the devise. If a devise be to the heir and another in fee, the heir takes by purchase, for he takes subject to survivorship in a stranger. But if a testator devise to his heir and another, as tenants in common, it seems that the devise to the heir, as to his moiety, is void; for he takes the part devised to him just in the same manner as if it had been left to descend to him. And where lands are subjected to a charge by a will, with a devise to the heir in fee, it seems that the heir will still take by his title of descent,

an exception out of the residuary clause: which determination was approved by Lord Northington, and confirmed by the Court of K. B. in Smith d. Davis *v.* Saunders. (*o*)

SECT. VI.

By what words an Estate Tail passes.

IN conformity with the principle of giving effect to the intention, an estate tail, as well as an estate in fee, may be created in a will by expressions, be they ever so informal, that manifest the meaning of the testator. To discuss the varieties into which the cases in the books have expanded the doctrine would require volumes of learned labour; the Reader can expect only the general heads of this multifarious subject to be treated of in this place.

The formal words of limitation whereby estates tail are to be created.

An inheritance in tail general is properly created in a deed where lands or tenements are given to a man, and his heirs of his body begotten. And this estate, according to Littleton, (*a*) "is called general tail, because whatsoever woman such tenant in tail taketh for wife, (if he hath many wives, and by every of them hath issue,) yet every one of these issues, by possibility, may inherit the tenements by force of the gift, because every of such issue is of his body engendered."

(*o*) 2 Black. 736.

(*a*) Sect. 14, 15.

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and not by purchase; and that if it is subjected to a temporary right of possession in another, until the heir pays a sum of money, and then is devised to the heir in fee, still the heir takes according to his better title, *i. e.* by descent. See Fearne's Posthumous Works, 226, 229., and see Reading *v.* Rawsterne, 2 Lord Raym. 4th Ed. 829.

"In the same manner it is," says the same Author, "where lands or tenements are given to the woman and to the heirs of her body; albeit that she hath divers husbands, yet the issue which she may have by every husband may inherit as issue in tail by force of this gift, and therefore such gifts are called general tails."

He then defines the tenancy in tail special to be, "where lands or tenements are given to a man and his wife, and to the heirs of their two bodies begotten; in which case none shall inherit by force of this gift, but those that be engendered between these two. And it is called *special* tail, because, if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherit by force of this gift; nor the issue of the second husband, if the first husband die."

Of the necessary words in a deed to create an estate tail.

These estates tail, whether general or special, are not, in general, to be created by a gift *inter vivos*, without the words of limitation used by Littleton as above stated; for every estate tail was a fee-simple at common law, and at common law no fee-simple could be conveyed by feoffment or grant without the word *heirs*; and to the word *heirs* must be added words to express from whose body the heirs intended are to spring. (1)

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(1) Yet, says Lord Coke, if a man gives lands to A. *et hæredibus de corpore suo*, the remainder to B. *in formâ prædictâ*, this is a good estate tail to B., for *in formâ prædictâ* do include the other. If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. *in formâ prædictâ*; this remainder is void for the uncertainty. But if the remainder had been to C. *in eâdem formâ*, this had been a good estate tail, for *idem semper proximo antecedenti refertur*.

The words 'of his body' are not so strictly required, even in a deed, but that they may be expressed by others which are tantamount; for the example which the statute *De Donis* puts has not the words '*de corpore*.' The words are these—*cum aliquis dat terram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis*.

Therefore if a man by deed give lands or tenements to A. and to his seed, or to the issues or children of his body, or to the issues of his body lawfully begotten, A. has but an estate for his life. (*b*) And if a conveyance be to a man and his heirs male, he thereby takes a fee-simple without regard to the word *male*.

What words are sufficient in a will to create an estate tail.

But in a will, if A. devise land to B. and his heirs male, the law will supply the words 'of his body,'

(*b*) Vent. 228, 229.

Therefore, if lands be given to B. *et hæredibus quos idem B. de primâ uxore suâ legitimè procrearet*, this is a good estate in especial tail, (although he hath no wife at the time,) without the words '*de corpore*.' So it is if lands be given to a man, and to his heirs which he shall beget of his wife, or to a man *et hæredibus de carne suâ*, or to a man *et hæredibus de se*. In all these cases, these are good estates tail, and yet the words '*de corpore*' are omitted.

The word *begotten* may in many cases be omitted in a deed; and though Littleton says ingendered, or begotten, yet if the words be 'to be begotten,' or, 'whom he shall have begotten,' the estate tail is good; and as *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before. Co. Litt. 20. b.

If lands be limited by deed to the use of J. S. *et hæredum masculorum suorum legitimè procreatorum*, remainder over, it is a fee-simple: but if it be *hæredum masculorum* de se, or, in English, 'the heirs of him lawfully begotten,' especially where there is a remainder over, it is tail. Bedell's case, 7 Rep. 41. Where the premises in a deed come short of the full description, provided they have the word 'heirs,' the *habendum* may supply what is wanting to make the estate tail; as if lands be given to B. and his heirs, to have and to hold to him and the heirs of his body, or if lands be given to B. and his heirs, to hold to B. and his heirs if B. have heirs of his body, but if he shall die without heirs of his body, that they shall revert to the donor, this has been adjudged an estate tail. See Co. Litt. 21. a. and the note by Mr. Hargrave, 124.

It seems that a limitation in a deed to a man and to the heir of his body in the singular number gives him an estate tail. See Co. Litt. 22. a. and Richards *v.* Lady Bergavenny, 2 Vern. 235. And, according to many authorities, *heir* may be *nomen collectivum* as well in a deed as a will, and operate in both in the same manner as heirs in the plural number; for which see the several authorities referred to by Mr. Hargrave, in note to Co. Litt. 8. b.

and make it an estate tail. (*c*) And if land be devised to B. and his *issue*, or to his *children*, and B. had none at the time of the devise, he takes an estate tail; for the intention to give to the children the land by such a devise is plain; and they cannot take as immediate devisees, not being in existence; nor by way of remainder, for the devise is immediate to B. and his children; therefore, the words must be taken as words of limitation, that is, as vesting an estate tail in the parent. (*d*)

In the case last supposed there is no way of executing the intention of the testator, but by giving the parent an estate tail: but if B. *has issue living*, and land is devised to B. and his issue, or children, the intention of the testator to give an immediate estate may be effectuated by a joint estate *being* executed in B. and his children; and there being no words of inheritance to indicate words of intention to give more than a life estate, they take only as joint-tenants for life.

Again, if the devise be to B. for his life, or to B. generally, and *after his decease* to his children, or *remainder* to his children, he having a son or daughter, the father takes but an estate for life, with remainder to his children for life; for no greater estate would have passed by these words at common law; and to make a will operate differently from a conveyance at common law, the intent of the testator must appear. (*e*)

Where lands are devised to another generally, and without any words expressive of the interest he is to take, he thereby becomes entitled only to an estate for life. Nor will a greater estate pass to the *devisee* by a devise to him and his assigns. But if after such general devise the testator shews his meaning to be, though expressed in the loosest terms, to continue the

(*c*) Co. Litt. 20 b. (*d*) 6 Rep. 17.
(*e*) Wild's case, 6 Rep. 17.

estate in the descendants of the devisee, his estate will be enlarged so as to carry such intention into effect.

Thus where a house was devised to three brothers, among them; provided always that the houses be not sold, but go to the next of the name and blood: it was resolved that the devisees took estates tail. (*f*)

And where a person devised lands to his three daughters to be equally divided; and if any of them died before the other, then the one to be the other's heir, equally to be divided; and if his three daughters died without issue, then he willed it to two strangers: it was adjudged that the daughters took estates tail (*g*)

A person devised land to his wife for life, and after her decease to his son; and if his son died without issue, *having no son,* that another should have it: it was adjudged that the son took an estate in tail *male.* (*h*)

R. J. being seised in fee of a copyhold of inheritance which he had surrendered to the use of his will, devised to J. Wedgeborough his house in the Brook, and 30*l.*, and then gave other pecuniary legacies; and to William Taylor, his sister's son, a house by the description of his "house on the green, with the ground and out-houses thereto belonging;" and declared his will and meaning to be, that if either of the persons before-named died without issue, lawfully begotten, then the said legacy should be divided equally between them that were left alive: adjudged that William Taylor took an estate tail.(*i*)

A man having issue two sons, devised all his land to his eldest son: and if he died *without heirs male,* then to his other son in like manner. The Court observed that the words 'of his body,' which properly

(*f*) Chapman's case, Dyer 333.
(*g*) King *v.* Rumball, Cro. Jac. 448.
(*h*) Robinson *v.* Miller, 1 Roll. Ab. 837.
(*i*) Hope ex d. Brown *v.* Taylor, 1 Burr. 268.

created an estate tail, were left out; but that the intent of the testator might be collected out of his will, that he designed an estate tail; for, without this construction, it would not have gone to his second son, if the first had died without issue. It was therefore an estate tail. (*k*)

A. devised to the three sons of C. D. successively, in tail male, remainder to every son and sons of the *said* C. D. which should be begotten on the body of Sarah his wife. And *for want of such issue* to W. N. &c. with a proviso that the devisees and their descendants should take the surname and arms of the testator. The Court of King's Bench resolved that the afterborn sons took several estates in tail male, in succession; as the words "for want of such issue" must be construed 'for want of heirs male of the body,' and that this was the true construction. (*l*)

A person devised in these words: "I give and bequeath all my copyhold lands to my nephew Isaac Slater: but, if the aforesaid Isaac Slater shall die *without male heir*, then my will is, that my nephew John Slater shall enter upon and enjoy the said copyhold lands, his heirs and assigns for ever; provided the aforesaid Isaac Slater paid to his wife Elizabeth Slater the sum of 8*l.* a-year during her life; with a power of entry to the wife if the annuity was not paid. It was contended, that Isaac took a fee by reason of the annuity. But Lord Kenyon said, it was clear from all the cases on the subject, that Isaac Slater took an estate tail.

What words will enlarge an express estate for life into an estate tail.

And although the testator gives to the devisee an express estate for his life only, such estate will nevertheless be enlarged into an estate tail to give effect to the general intent of the testator by embracing the ulterior objects of the devisor within its legal extent and duration.

A. Dymock devised to his nephew William all his

(*k*) Blaxton *v.* Stone, 3 Mod. R. 133.
(*l*) Evans *v.* Astley, 3 Burr. 1570. (*m*) 1 Vent. 230.

freehold estate at A. to hold to him during his natural life; and, after his decease, to and amongst his issue; and, in default of issue, to be divided between his nephew E. and his niece M. and to their heirs and assigns for ever. (*n*) Lord Kenyon said, that although this will was very inaccurately drawn, he thought the devisor's *general intention* might be collected from the words of it: the great question in the case was, what estate W. Dymock took under the will. In the first clause the estate was expressed to be given only during his natural life: but in the next limitation it was to go to his issue, and in default of issue it was to go over; it was clear, therefore, from the whole of the will that the devisor did not intend that it should go over to those in remainder, until after a general failure of issue in W. Dymock. He thought that the Court was warranted by many determinations, and particularly by that of Robinson *v.* Robinson, (*o*) to give that effect to the will which would best answer the devisor's *general* intention; though by so doing they might defeat some *particular* intention. Here the *general* intent was, that W. Dymock and his issue should take first; then what construction would best effectuate that intention? It had been argued by the plaintiff's counsel that W. Dymock took only an estate for life, and his children an estate tail: but it would be difficult to put two different interpretations on the word 'issue;' and, even if that could be done, it would not further the intention of the devisor, for there were no cross remainders to the children, and they never can be supplied; so that, according to the construction contended for, if one of the children died, his share would go over to those in remainder, in prejudice of those children who survived; which was certainly not intended by the devisor. Therefore his general intent would be best answered by saying, that W. Dymock took an estate

(*n*) Doe *v.* Applin, 4 Term Rep. 82. (*o*) 1 Burr. 38.

farther than had been done in other cases. Judgment was accordingly given that W. Dymock took an estate tail.

A testator devised all his freehold messuages, &c. to his daughter Mary Ayscough, and the heirs of her body, lawfully to be begotten, for ever, as tenants in common, and not as joint-tenants; and, in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then he gave his freehold messuages to R. Ayscough in fee. (*p*)

Particular intention expressed must give place to the general intention collected from the whole will.

Lord Kenyon said, it was a rule of construction in cases of this kind, settled by a variety of decisions, but particularly by that of Robinson *v.* Robinson, that where it appeared in a will that the testator had a *general intention* and also a *secondary intention*, and they clashed, the latter must give way to the former. Here were no words of limitation added to the estate given to the children, (supposing they took as purchasers;) and yet the remainder over was not to take effect till there was a general failure of her issue; so that there must be an estate to comprehend all her children for ever; his Lordship concluded in these words—"I admit that in this case the testator intended that his daughter M. Ayscough should only take an estate for life, and that her children should take as purchasers: but then he also intended that all the progeny of those children should take before any interest should vest in his more remote relations. Now the latter intention cannot be carried into effect, unless M. Ayscough takes an estate tail; in order, therefore, to give effect to the devisor's *general intention*, according to the fair construction of the will, M. Ayscough must take an estate tail."

Henry Cook devised a messuage or tenement to Richard Cook *for the term only of his natural life;*

(*p*) Doe *v.* Smith, 7 Term R. 531. 1 Burr. 38.

tail; and, in so determining, the Court would not go and after his decease he gave and devised the same unto the lawful issue of the said Richard Cook, as tenants in common, to whom he gave, devised, and bequeathed, the same; but in case the said Richard Cook should die without leaving lawful issue, then, and in such case, after his decease, he gave and devised the same to Elizabeth Harding in fee. (*q*)

Lord Kenyon said, it had been the settled doctrine of Westminster Hall, for the preceding forty or fifty years, that there might be a *general* and a *particular* intent in a will, and that the latter must give way when the former could not othewise be carried into effect. That this doctriue had been confirmed by the cases of Robinson *v.* Robinson, Roe *v.* Grew, and Doe *v.* Smith. That the Court would best fulfil the *particular* intent of the testator in this case, by giving Richard Cook only an estate for life; but the *general* intent was that all his issue should inherit the entire estate before it went over; and *that* intent could only be answered by giving him an estate tail, by implication from the subsequent words, "in default of his leaving issue."

Where there is a devise to one for life expressly, with remainders to first and other sons, and then a limitation over in default of issue, the estate for life is not enlarged by implication.

If an estate be devised to a man for his life with remainders to his first and other sons indefinitely in tail, and then the limitation over is introduced by the words "in default of issue," or "for want of issue of the body of the first taker," or "in default of heirs male," by these words in such a case the express estate for life given to the first taker shall not be enlarged by construction into an estate tail, for the limitations as they stand extend to all the issue of the first taker. And for this the case of Bamfield *v.* Popham (*r*) is the leading and standard authority. But if an estate be given to a man for his life, with limitations to his issue falling short of the testator's manifest intent to embrace all his issue within the scope of the limitations, and then come the

(*q*) Doe *v.* Cooper, 1 East R. 229. (*r*) 1 P. Wms. 54.

words "if he shall die without issue, or in default of issue," these words in such a case will reflect back an estate tail upon the first taker, notwithstanding his express estate for life. (2)

The learned Editor of Peere Williams in his note to the case of Bamfield and Popham very justly observes, that there is no general or fixed rule for the construction of words of this kind; but that Courts both of law and equity consider the raising of estates tail by implication always to depend upon the question whether such implication be necessary, or not, to effectuate the *general intention* of the testator: and that this is the true and proper criterion appears strikingly from the case of Langley *v.* Baldwin. (3) That was a case referred by the Court of Chancery to the Judges of the Court of Common Pleas for their opinion, in the time of Lord Trevor; and the limitations ran thus;—to A. *for his life without impeachment of waste, and with a power of jointuring,* remainder to the first, second, and so on, to the sixth son of A., and no further, in tail male; then came the words, "And if A. shall die without issue male of his body," remainder to B. in fee. Here notwithstanding the limitation to A. was without impeachment of waste, and with a power of jointuring, which are usually coupled with a life estate, and therefore in some degree declaratory of an intention in the testator to confine the interest to the life of the first taker, yet the Judges of K. B. were unanimously of opinion that A. took an estate tail by implication; because if there should be a seventh son, and the six sons should die

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(2) Langley *v.* Baldwin, correctly stated in the case of the Attorney General *v.* Sutton, 1 P. Wms. 753.

(3) In Ginger *v.* White, Willes 348., the C. J. observed, that this case of Langley *v.* Baldwin was best stated in 1 P. Wms. 759. in the Attorney General *v.* Sutton. And in the case of Alanson *v.* Clithero, 1 Ves. 25. it was observed by Lord Hardwicke, that the case of Langley *v.* Baldwin was wrongly reported in Equity Cases Abridged in the very point.

without issue, the property would pass over such seventh son, and go to a remote remainder-man, which could not be supposed to have been the intention of the testator; therefore, to let in such seventh son and other subsequent sons to take (but still to take as issue male of the body by descent and not by purchase) the Court held that A. took, by implication of law, an estate tail.

In the case of Ginger d. White *v.* White, (*s*) the devise may be shortly stated thus. The testator John White the elder, being seised in fee of the premises in question, devised to J. for life, and from and after his decease to the male children of J. successively one after another as they were in priority of age, and to their heirs, and in default of male children of J., then to the female children of J. and their heirs, and in case the said John should die without issue, then he gave the house to his grandson W.; and upon these limitations in the will it was held that J. took only an estate for life; in pronouncing which opinion it was said by Lord Chief Justice Willes, that to find out what construction is to be put upon the words of a will, we ought in the first place to consider what the intent of the testator is, which is too often the last thing that is thought of. And, in adverting to the case of Bamfield *v.* Popham, he observed "It has been said, that that case has been held not to be law. I am sure I have heard it cited, at least twenty times, in the Court of Chancery, and never heard it contradicted; and, I believe, I never shall, except by those persons who know not how to distinguish it (though the distinction is plain and obvious) from some other subsequent cases." The learned Chief Justice then proceeded to point out what those cases were from which it was so distinguishable; and mentioned particularly the case of Langley *v.* Baldwin.

The limitations in Bamfield and Popham were to the first and other sons indefinitely in tail male, extending

(*s*) Willes 348.

to all the issue which might be born of the body of the first taker. Therefore in Bamfield *v.* Popham there was no need of construing the express estate for life into an estate tail, since all the issue in tail were already comprehended under the limitations as they stood. And, as was observed in the Attorney General *v.* Sutton, (*t*) in such a case the words "if he shall die without issue male," shall be considered as predicated of *such* issue male; and when vainly inserted, and they cannot operate or be of use, they shall not be construed so as to merge and destroy an express estate for life.

The case of the Attorney General *v.* Sutton (*u*) was to the same effect, which was shortly this: One seised in fee devised his lands to his nephew *for his life*, remainder to his first and second sons *in tail male* successively, (without carrying the limitations further *to his* other sons,) and after his said nephew's death, *without issue male of his body*, then the remainder over to trustees, for charities. And here the case of Langley and Baldwin was relied upon as expressly in point; and the difference was taken between that case and the case of Bamfield *v.* Popham, in which the limitation was to the first and every other son and sons in tail male successively, and so comprehending all the issue male of the first devisee indefinitely. This case passed through several stages of adjudication: but the words "and if he shall die without issue male of his body" were at length adjudged to give an estate tail to the first devisee.

In Robinson *v.* Robinson, (*x*) the limitation was to Launcelot Hickes for his life, and *no longer*, and after his decease, to such son as he should have, lawfully *to* be begotten; and *in default of such issue* then *to* the testator's right heirs; and these words, *in default of issue*, were held to give to the father an estate tail; for it was plain the testator did not design that his heirs

(*t*) 1 P. Wms. 753. (*u*) *Ibid.* (*x*) 1 Burr. 38.

at law should take until his lineal posterity was extinct.

In the Attorney General *v.* Sutton the express limitations went no further than to the second son. In Langley *v.* Baldwin, the estate was expressly carried to the sixth son, and no further. And in the recent case of Wight *v.* Leigh, (*y*) the words of the will gave only *life-estates* to the sons.

In all these cases the intention of the testator was plain, that the remainder over should not take place until the lineal descendants of the first taker should be exhausted; to carry which general intention into effect, it was necessary to enlarge the life estate given to the first taker into an estate tail. But in Bamfield *v.* Popham, the specified limitations carried the estate to all the possible issue of the first taker, in succession.

Issue co-extensive with heirs male, or heirs of the body.

In the consideration of this point, whether the words be "in default of *issue* male," or "in default of *heirs* male," they are of the same force in a will.

In the case of Doe *v.* Aplin, (*z*) two of the learned Judges observed upon the word "issue," that it was equal in extent in a will to the words "heirs of the body;" and the saying of Mr. Justice Rainsford(*a*) was cited, "that the word 'issue' is, *ex vi termini, nomen collectivum,* and takes in all the issue to the utmost extent of the family, as far as the words 'heir of the body' would do."

A limitation to one and his heirs may be reduced by subsequent words to an estate tail.

It is old and settled law that if a man devise an estate, to another, in words that primarily import the fee simple, yet the subsequent words may controul the devise, and reduce the gift to an estate tail. Therefore, if a testator devise lands to A. and his heirs, and afterwards devise the same lands to another, in case A. dies without issue, A.'s estate is reduced to an estate tail; the word 'heirs' being understood in the restricted

(*y*) 15 Ves. J. 564. (*z*) 1 T. R. 82.
(*a*) Finch 282., and see the case of King *v.* Melling, 229.

sense of 'heirs of the body.' Otherwise the limitation over could not vest according to the intention of the devisor; for the law does not carry its favour towards wills so far as to suffer the limitation of a fee upon a fee.

Accordingly, in a very early case, (*b*) where a man devised lands to A., his daughter, and her heirs, and if she died without issue in the life-time of her sister B., that it should remain to B. and her heirs: three judges held this to be an estate tail in A.; against the opinion of Dyer, who thought that A. took only a fee-simple conditional. But the resolution of the three Judges has been since established by an uniform series of decisions. (*c*)

In Brice *v.* Smith, (*d*) this rule of construction was considered applicable to the case where, after a devise by a testator of his freehold messuage to his son P. B. and his heirs for ever, on condition of his paying a sum of money to W. B., the following clause was added,—"*Item,* my will and mind is, that in case any of my said children, unto whom I have bequeathed any of my real estates, shall die without issue, then I give the estate of him so dying *unto his or their right heirs for ever.*" In this case it was said that though *heirs* would have been construed *heirs of the body,* in case the remainder had been devised over to a stranger, it would be otherwise in the case before the Court, because the remainder was devised over to the heirs of the person so dying without issue. But Lord C. J. Willes, who delivered the opinion of the Court, said, "that though this distinction had seemed at first to be of some weight; yet, that when considered, it made no difference in reason or law. That even in grants, if there were words that created an estate tail, the grantee

(*b*) Clatche's case, Dyer 330.

(*c*) Soule *v.* Gerrard, Cro. El. 525. Dutton *v.* Engram, Cro. Ja. 427. Chadock *v.* Cowley, Cro. Ja. 695.; and particularly the case of Fitzgerald *v.* Leslie, 3 Bro. P. C. 154.

(*d*) Willes 1.

would have an estate tail, though the next remainder was limited to his heirs. And nothing was more common in settlements than to limit an estate to a man and the heirs of his body, remainder to his right heirs; and for this plain reason—to prevent his disinheriting his issue, except by some solemn act done in his lifetime." The Court were all clearly of opinion that P. B. took an estate tail.

A charge annexed makes no difference as to this construction.

Although there was a charge upon the devisee in respect of the estate, that circumstance appeared to have no weight in the case last mentioned, not being adverted to either by the bar or by the bench. But in Dutton *v.* Ingram, (*e*) a question of this sort arose. William Goldwell, seised of lands in fee, devised them to his wife for life, and after her death to John his eldest son and to his heirs, upon condition that he, as soon as the land should come to him in possession, should grant to Stephen, his second son, and *his heirs,* an annual rent of four pounds out of the said tenements; and that if the said John died *without heirs of his body,* that the land should remain to the said Stephen and the heirs of his body.

The first question was, whether John had an estate in fee by the devise, which was to him and his heirs, upon condition that he should grant a rent to Stephen and his heirs, whereby the intent was shewn, as it was said, that he should have a fee; otherwise he could not legally grant such a rent to have continuance after his death. But it was resolved to be an estate tail; for being limited that if he died *without issue,* then it should go to Stephen, and the heirs of his body, that shewed what heirs of John were intended, viz. *heirs of the body.* But yet, by the limitation of the will, he was to make a grant of the rent, which, being by appointment of the donor, was not *contra formam donatoris,* but stood with the gift, and should bind the issue in tail.

And in a much later case, (*f*) where J. B. devised to

(*e*) Cro. Jac. 427. (*f*) Roe *v.* Avis, 4 T. R. 605.

his wife for life, and after her decease to be equally divided among his four children, A., B., C., D., and to each of them and their heirs for ever, share and share alike; and in case they should be minded and agree among themselves to sell the estate, they should have equal shares of the monies from thence arising; but if they agreed to keep the estate whole together, then all the rents, issues, and profits thereof, should be equally paid and divided between them and to the several and respective heirs of them on their bodies lawfully begotten, share and share alike: it was held that the children of J. B. took only estates tail in their respective fourths. For though it was given to them and their heirs, *and they had also a power of selling the estate by the former part of the devise;* yet the subsequent words, "to the several and respective heirs of them on their bodies lawfully begotten" restrained the operation of the former words, and reduced the estate devised to an estate tail. (*g*)

Where a man devised lands (*h*) to A. his son *for ever*, and after his decease remainder to his heir male for ever, with other remainders over, it was holden an estate tail in A.; for, though the first devise being to him for ever, would give him the fee-simple; yet the subsequent words *to his heir male* shewed what sort of inheritance the devisor intended him.

Of the rule commonly called the rule in Shelley's case.

The words *for ever* in this case, by force of the succeeding words, were rendered inoperative; and then the case was, as if the first limitation had been to A. generally, or for his life, with remainder to his heir male, and in a will is the same as if the remainder had been to the heirs male of his body, which is executed in the ancestor, and gives him an immediate estate tail; in virtue of a rule, which has been most copiously discussed in the fifth section of Mr. Fearne's Contingent Remainders, who has explained it in all its variety of ap-

(*g*) See also to the same effect Doe *v.* Rivers, 7 T. R. 276. and Doe *v.* Whichelo, 8 T. R. 211.

(*h*) Roll. Abr. 836.

plication, and with all the distinctions which negatively mark its boundaries.

The lineaments of the rule alluded to (which it would be an idle shew of learning to treat of *at large* in this place, instead of referring the Reader to those publications, which have been distinctly devoted to the consideration of it,) (*h*) we will endeavour in a few pages to make intelligible to the student.

An estate for life to A., remainder to his heirs or to the heirs of his body, is not an estate in A. for his life, with a contingent remainder to his heirs or the heirs of his body, but an immediate estate in fee or in tail in A. So if A., by will or otherwise, has an estate of freehold limited to him, and the same instrument contains a subsequent limitation to his right heirs or to the heirs of his body, after some other estate for life, or in tail, interposed between such limitation of the first estate to him, and such subsequent limitation to his heirs or heirs in tail, this remainder to the heir or heirs of the body of A. vests in A. as a remainder, and is transmitted through him by descent as from ancestor to heir; the general rule being this, that whensoever the ancestor takes any estate of freehold, whether it be or be not such as may determine in his lifetime, and there is afterwards in the same conveyance an unconditional limitation to his right heirs, or heirs in tail, (either immediately, and without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of such mean estate), there, such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then becomes executed in the ancestor, forming, by its union with his particular freehold, one estate of inheritance in possession: but where such limitation is *mediate*, it is then a remainder vested in the ancestor who takes the freehold, not to be exe-

(*h*) See the able Treatise of Mr. Preston on this subject.

cuted in possession till the determination of the preceding mean estates. Thus, if there be an estate to A. for his life, or during the life of C. or any other sole estate of freehold, remainder to the heirs of the body of A., this is an estate tail executed in possession in A.: but if there be an estate to A. for his life, or during the life of C., or any other estate of freehold, remainder to B. for life, remainder to the heirs of the body of A., this is only a present freehold in A., with a vested remainder to him in tail, to take effect in possession after the determination of B.'s estate.

Where the limitation to the heirs, or to the heirs of the body of any ancestor taking the preceding freehold, is contingent, as where it is to two or more for their lives, remainder to the heirs of the survivor, even though the estate so limited could by no possibility have vested in the ancestor, as in the case of a gift to two for their *joint* lives, remainder to the heirs of the one dying first, the heir still takes by descent. (*i*) If such contingency on which the vesting is made to depend happen in the lifetime of the ancestor, the remainder then becomes a vested remainder, and, as such, attaches in the ancestor. So that whether limited on a contingency, or so as that it may immediately vest, it is the ancestor's estate, and the heir can only take by descent. (I)

(*i*) Co. Litt. 378. b.

Probable origin of the rule.

(1) The most probable origin of the rule is to be found in the spirit and exigency of the feudal system, of which it was the established principle, that the heir should not take even the contingent remainder of an estate as a purchaser where the ancestor took a previous estate of freehold by the same conveyance; because by a different construction the lord would be deprived of the fruits of his tenure, and the heir enabled to take the inheritance in a character that would exempt him from the feudal burthens. And although, by the abolition of tenures, the foundation failed which gave rise to this construction, the importance of preserving consistency and uniformity in the law continued to the rule its technical authority, and generalized its application to all instruments by which real property could be passed and transferred.

But if by the wording of the contingent limitation a clear intention is manifested to use the word 'heirs' merely as a description of the person to take, the party so designated acquires by the happening of the contingency an estate by purchase or first acquisition, and becomes the stock from which a new inheritance is derived.

It has, however, with great perspicacity, been remarked by Mr. Fearne, that when the words 'heirs male of the body' operate as words of purchase, that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a sort of equivocal or mixed effect; for, though they give the estate to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor, as to pursue the same course of succession as if it had attached in and descended from the ancestor.

Thus a limitation to the heirs male of the body of B., (where no estate is given to B. himself,) though it originally attaches in his heirs male under that special de-

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Since, however, the original reason of the rule has ceased to exist, though Courts of law and equity have recognized the importance of adhering to the technical import of instrumental language on whatever principle the same may have been grounded, if once settled by usage; yet, as the exigency is gone which gave rise to the rule, the Courts have been readily disposed to consider cases out of its controul, where an intent inconsistent with its application could be plainly and decisively collected from the language of a will.

It is proper to be observed, however, that this account of the origin of the rule was doubted by Mr. Justice Blackstone in his argument in the case of Perrin *v.* Blake, who was rather inclined to believe that one purpose of its establishment might be to prevent the inheritance from being in abeyance; and another, which was opposite to the genius of the feudal institutions, to facilitate the alienation of land by giving the dominion to the ancestor, which would be throwing it one generation sooner into the track of commerce. Mr. Hargrave ascribed the rule to the general policy of preventing a real descent from assuming the qualities and properties of a purchase.

scription, and so far operates as by purchase, yet it not only gives such heir an estate in tail male, without any express words of limitation to the heirs male of his own body; but such an estate tail as will, on failure of his issue male, go in succession to the other heirs male of the body of B. in the same course as if the estate tail had descended from B. himself.

Thus the limitation above supposed does not operate strictly as a descent, because the estate never did or could attach in the ancestor; neither is it in its effect altogether a purchase, because it devolves in the same course of succession as it would have done under a descent.

On failure of issue of the first special heir of B., it would go to the other heirs falling under the same description.

And where, between the estate of freehold given to A., and the subsequent limitation to his heirs, or heirs of his body, contingent estates are limited to others, though in such a case there is nothing interposed to prevent the immediate union of the limitations to the ancestor and his heirs, yet such union does not operate to merge the freehold in A. necessary to support the intervening contingent limitations; but the two limitations are united and executed in the ancestor, only until such time as the intervening limitations become vested, and then open and become separated in order to let in such intervening limitations as they arise. Thus in Lewis Bowles' case, (*m*) where there was a limitation to husband and wife for their lives, remainder to the first and other sons of the marriage in tail, remainder to the heirs male of the bodies of husband and wife, the Court resolved that it was an estate tail executed in the husband and wife *sub modo*, that is, so as not to merge the estates for life absolutely, but executed only till the birth of the first son: and then the estates should become divided by operation of law, and the

(*m*) 11 Rep. 80.

husband and wife become tenants for their lives, remainder to their first and other sons, remainder to husband and wife in tail.

For the junction of the two estates, to take place by force of the rule, they must be the same in nature and quality.

But for this junction of the two estates to take place in the case of husband and wife, the remainder must be the same in quality with the preceding limitation, that is, if the limitation of the freehold be *joint*, the subsequent limitation of the inheritance must be *joint* also, as in the case of Lewis Bowles just mentioned. If there be a limitation to the wife for her life, remainder to the heirs of the body of husband and wife, no inheritance is executed in the wife. So, if the limitation of the freehold be not joint but successive, as to one for life, remainder to the other for life, remainder to the heirs of their two bodies, the ultimate limitation is not executed in possession, but the husband and wife take a joint remainder in tail. Though in the case of a limitation to A. for life, remainder to the right heirs of him and B., a stranger, (B. being alive at the time,) the ulterior limitation is said to be executed immediately in A. for a moiety. (*n*)

Not material whether the estate in the ancestor be by express limitation or implication.

For this rule to apply there must, of course, be an estate in the ancestor: but it is the same in consequence whether this estate is in him by express limitation, or implication, or by resultancy; (*o*) so as both the estates be legal, or both equitable, for otherwise the union cannot take place. (*p*)

If the limitation to the ancestor be followed by a limitation to the next heir male in the singular number, with words superadded, the rule is excluded.

If the limitation to the ancestor be succeeded by a limitation to the heir or heir male, or next heir male in the singular number, the rule above mentioned operates to make this an expansion of the first estate into an estate tail: (*q*) but if words of limitation are superadded to such previous limitation in the sin-

(*n*) 2 Roll. Abr. 417. pl. 6. and see Roe *v.* Quartley, 1 T. R. 630.

(*o*) Pibus *v.* Mitford, 1 Vent. 372.

(*p*) Venables *et Ux. v.* Morris, 7 T. R. 342, 438.

(*q*) See Welkins *v.* Whiting, 1 Roll. Abr. 836. Burley's case cited by Hale, C. J., 1 Vent. 230. White *v.* Collins, Com. Rep. 289. Miller *v.* Seagrave, Rob. Gav. 96. Trollop *v.* Trollop, *ibid.* and Ambl. 453.

gular number, the person answering the description of heir takes by purchase, and becomes the root of a new inheritance, the stock of a new descent, and the rule under consideration has no influence on such a case. Still however, if the first words of limitation are in the plural, words of superadded limitation engrafted upon them will not convert them into words of purchase. In Archer's case, (*r*) lands were devised to A. for life, remainder to the next heir male of A., and to the heirs male of the body of the next heir male. A's estate was adjudged to be only an estate for life, and the remainder to the next heir male to be a good contingent remainder taking effect in him by purchase. But, in the great case which gave the name to the rule, (*s*) the limitation was to the use of the heirs of the body of E., lawfully begotten, and of the heirs of the body of such heirs male lawfully begotten, remainder over, in virtue of which limitation E. took an estate tail.

Nevertheless, if the superadded words limit an estate of a different nature from that which the ancestor would take by virtue of the first limitation to his heirs or heirs male, as if there be a limitation to A. for his life, and after his decease to the use of his heirs, and the heirs female of their bodies; the rule in question seems to be excluded. For such superadded words of limitation to exclude the rule, they must describe an estate descendible in a different course, and to different persons, as special heirs, from those to whom the previous limitation would carry the estate; for if the devise be to A. for life, and after his decease to the heirs of his body begotten, and their heirs for ever, A. clearly takes an estate tail.

Of the case of Perrin v. Blake.

The case which has given rise to the fullest discussion of the rule of law, usually designated as the rule in Shelley's case, is the case of Perrin *v.* Blake, (*t*)

(*r*) 2 Rep. 66. (*s*) Shelley's case, 1 Rep. 93.

(*t*) 4 Burr. 2579. 1 Blackst. Rep. 672. Hargr. Law Tr. 490. See also *Collectanea Juridica*, Vol. I. p. 283.

which, may be thus shortly stated. W. Williams devised as follows:—"Should my wife be ensient with child at any time hereafter, if it be a male, I give my estate real and personal equally to be divided between the said infant and my son John Williams, when the said infant shall attain the age of twenty-one. *Item,* it is my intent and meaning that none of my children shall sell or dispose of my estate for longer term than his life; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son John Williams and the said infant for the term of their natural lives; the remainder to my brother-in-law J. G. and his heirs, for and during the lives of my son John Williams and the said infant, the remainder to the heirs of the bodies of my said sons John Williams and the said infant lawfully begotten or to be begotten; the remainder to my daughters, &c. No other son was born; and the question was what estate John Williams took under this will?

Yates, J., with great strength of argument, maintained that he took an estate tail; but it was decided by Lord Mansfield, C. J., and the other two Judges of the Court of King's Bench, that he took an estate for life only, such being the clear intent of the testator as indicated by the expressions of the will. This judgment in the King's Bench was reversed by a majority of the Judges in the Exchequer; and, the case being afterwards carried to the House of Lords, the dispute was compromised, and the writ of error withdrawn.

The case has been taken up and supported, with great force of reasoning against the decision of the Court of K. B., by the late Mr. Fearne; and has been the subject since of repeated disquisition.

On the ground that in Perrin *v.* Blake the limitation to the heirs of the body after the life estate to the ancestor was general, unrestrained to any interest less than the inheritance, nor made the root of any new inheritance by the annexation of words of new limitation upon it; and entirely uncorrected and unexplained by any kind of preceding or subsequent limitations to

sons, or objects of a particular designation, Mr. Fearne contended with great earnestness and effect that the limitation in question fell within the rule furnished by Shelley's case.

The same writer has with great labour of illustration maintained, that until 1769, when Perrin *v.* Blake was before the King's Bench, there had occurred no case where a perfect limitation to the heirs, or heirs of the body in the plural number, unqualified by any accompanying limitation to sons, daughters, or children, (by reference to which the general force of the word *heirs*, &c. might be restrained) preceded by a limitation of the legal estate for life to the ancestor, in the same deed or will, had been held not to attach in that ancestor, but to go to the heir by purchase.

To exhibit the full force and latitude of the rule in question, Mr. Fearne has produced a long list of cases, some of which shall be laid before the Reader.

A. seised of a copyhold in fee surrendered it to the use of his will, and afterwards devised it to B. for his life, the remainder to his heir of his body begotten for ever: it was held that the heir of B. took by descent, and not by purchase. (*u*)

Where the first estate is express for life, rule prevails.

And where a testator devised to his son J. certain lands, to hold the same to him for life, for and upon the use, conditions, and limitations thereafter limited; and after his decease, then to the use of the heirs male of his body; and for default of such issue to his son W. and the heirs male of his body, remainders over; here also, notwithstanding the limitation was express to J. for his life under the conditions, &c., it was held that J. took an estate tail by virtue of the subsequent limitation to the heirs male of his body. (*v*)

So though the estate for life be coupled with a power of jointenancy.

And in another case where land was devised to trustees and their heirs, upon trust to permit A. to receive the rents and profits for his life, and then to stand seised to the use of the heirs of the body of A., with a pro-

(*u*) Pausey *v.* Lowdall, 2 Roll. Abr. 794. Style 244.
(*v*) Rundall *v.* Ecly, Cart. 170.

viso that the trustees and A. might make a jointure for his wife, it was decided that A. took an estate tail, notwithstanding the inference afforded by the power conferred on him of making a jointure, the same also being made to depend upon the concurrence of the trustees. (*x*)

In this case the strength of the general rule prevailed against all arguments of intention.

Again, where a testator bequeathed the surplus of his personal estate to be laid out in lands, to be settled on B. for life, and after his decease to the heirs male of the body of B. lawfully to be begotten, and the heirs male of the body of every such heir male, severally and successively as they should be in priority of birth, every elder and the heirs male of his body to be preferred to every younger; and for want of such issue to his brother C. for his life, and after his decease to the heirs male of his body begotten, &c. Lord Cowper directed a case to be made for the opinion of the Judges of K. B., upon which three Judges against one held it to be an estate tail; and the Chancellor decreed accordingly. (*y*)

So in a case upon an appeal to the Council, where the testator devised to L. for life, then to the heirs of the body of L. and their heirs; and if she died without such heir of her body then over: L. was held to have by such limitation an estate tail. (*z*)

So although the estate for life be without impeachment of waste.

And in a case where a conveyance was directed by a will to be made to one for her life *without impeachment of waste*, remainder to the *issue* of her body, remainder over, Lord Talbot said he should have made no difficulty of determining it to be an estate tail, had it been an immediate devise, although the words were not *heirs* but *issue* of the body, which is not so appropriate a

(*x*) Broughton *v.* Langley, 2 Lord Raym. 879.

(*y*) Legate *v.* Sewell, 1 P. Wms. 87. and see the Observations of Lord Hardwicke, 2 Ves. 567.

(*z*) Morris *v.* Le Gay, 2 Burr. 1102.

term as the word *heirs* to express an estate to pass by transmission. (*a*)

In the case of Papillon *v.* Voice, (*b*) where by one of the clauses in the will lands were devised to B., *without impeachment of waste, remainder to trustees and their heirs during the life of* B. *to support contingent remainders,* remainder to the heirs of the body of B., remainder over. Though it was decreed at the Rolls, that an estate for life only passed to B., with remainder to the heirs of his body by purchase; yet, upon an appeal from this decree, Lord C. King declared that the remainder to the heirs of the body of B. was within the rule; and, as words of limitation, must give an estate tail to B., adding, that the breaking into this rule would occasion the greatest uncertainty. And in Coulson *v.* Coulson, (*c*) notwithstanding the interposition of the estate in trustees to support contingent remainders, a similar limitation over to the heirs of the body of the first taker, though the devise to him was expressly for his life, was construed to pass a vested estate tail.

Where the subsequent limitation has been qualified so as to carry the estate to the devisee by purchase or original acquisition.

There is, however, a variety of cases where the subsequent limitation to the heirs of the body has been so qualified and corrected by other additional words, as thereby to be made to operate as words of purchase: but all, or the far greater part of these, will be found, on attending carefully to the language used, to be materially distinguishable from the case of Perrin *v.* Blake, above adverted to. They will be found, some of them to have used words, the legal import of which is less established than the word *heirs,* such as issue, or sons, or children; or to contain no limitation of the legal freehold to the ancestor; or to have expressly restricted to a life interest the limitation to the heir, or heir male; or to have marked the same as importing a designation of the

(*a*) Lord Glenorchy *v.* Bosville, Ca. temp. Talb. 3. and see King *v.* Burchell, Ambl. 378.

(*b*) 2 P. Wms. 471.

(*c*) 2 Strange 1125. 2 Atk. 246. and see Hodgson *et Ux. v.* Ambrose, Dougl. 330.

person to take originally, and not derivatively, by some unequivocal terms; or to have been directory of trusts to be executed, and not to take effect by the immediate operation of the devise itself.

Archer's case has been already noticed as a case of this class; and similar in its circumstances was that of Cheek *v.* Day, (*d*) where the limitation was to the heir in the singular number, with words of limitation engrafted thereon; where the effect of the superadded words was to restrain the import of the word 'heir' to a designation of the person to take by purchase as the stock of a new inheritance. And in Walker *v.* Snow, (*e*) where A. conveyed by fine to the use of himself for life, remainder to the use of his first son and the heirs male of his body, with like limitations respectively to his second, third, fourth, fifth, and sixth sons, remainder to the right heir of A. to be begotten after the sixth son, and of his heirs male; it was held that the remainder to the right heir of A. was contingent because of the previous limitations, the remainder in question being exclusive of the first six sons, and therefore essentially differing from a limitation to the heirs of the body, which would have descended to the eldest son first; and, further, the limitation was to the heir in the singular number, with words of limitation superadded.

Thus also where A. covenanted to stand seised to the use of himself for life, and after his decease to the use of E. his son for life, and after his decease to the use of the first son of the body of E. and the heirs male of the body of such first son, and for default of such issue to the use of the second son and the heirs male of the body of such second son, *and so* severally and respectively to every of the heirs male of the body of the said E., and the heirs male of the bodies of such heirs male according to their ages

(*d*) Moor 593. 2 Roll Abr. 417. (9) pl. 7. Cro. El. 313. Ow. 148. and see Harg. Law Tracts 506.

(*e*) Palm. 359.

and seniorities, and for default of such issue, remainder to W., &c. And A. also covenanted that if it should happen that E. should die without issue male of his body lawfully begotten, then that he would stand seized of the lands to ulterior uses; E., after the death of A., suffered a common recovery of the lands, and afterwards died without issue; and W. the remainderman brought his ejectment for the lands in B. R. The Court held the words 'and so' to be words of relation, implying that the heirs male were to take as the sons were to take under the previous limitations, *i. e.* by purchase; and gave judgment accordingly for the plaintiff, which was afterwards affirmed in the Exchequer Chamber. (*f*)

In Loddington *v.* Kime, (*g*) A. devised lands to E. for life, without impeachment of waste; and *in* case he should have any issue male, then to such issue male, and his heirs for ever: and upon a question whether this subsequent limitation to the issue male of B. made B. tenant in tail or not, it was held that it did not, but was a contingent fee to his issue male. Which last case was taken out of the rule by words of limitation grafted on the words *issue male.*

So, in the case of Backhouse *v.* Wills, (*h*) there was a limitation to one for life only, and after his decease to the issue male of his body, and to the heirs male of the bodies of such issue. Here, besides the restricted word *only*, the devise was to the issue male with words of limitation engrafted thereon: but it was observed by the Lord Chancellor Parker, that if the words *heirs male* had been used instead of issue male, the operation of the law would have been too strong for the intention of the testator.

In White *v.* Collins, (*i*) after a devise to F. for life, with power to make a jointure, the limitation was to the

(*f*) Lisle *v.* Gray, Raym. 278. 2 Lev. 223.
(*g*) 1 Salk. 224. Lord Raym. 203.
(*h*) 1 Eq. Abr. 184. pl. 27.
(*i*) Com. Rep. 289.

heir male of his body begotten during the term of his natural life, with remainder over: F. was held to have no more than a life estate. And in another case, (*n*) where the devise was to A. and his heirs lawfully to be begotten (that is to say) to his first, second, third, and every son and sons successively, lawfully to be begotten of the body of the said A., and the heirs of the body of such first, second, third and every other son and sons successively, lawfully issuing, as they should be in seniority of age and priority of birth, the eldest always and the heirs of his body to be preferred before the youngest and the heirs of his body, remainder over: it was adjudged that A. took only an estate for life; the subsequent clause not being contrary to the preceding general limitation to A., but explanatory of what heirs were meant.

And again in a case where the devise was of gavelkind lands to A. and the heirs of her body, lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally share and share alike, as tenants in common, and not as jointenants, it was held that the word *heirs of her body* did not operate as words of limitation, to create an estate tail in A.; for the words *females* as well as *males*, annexed to the words *heirs of the body*, were inconsistent with the course in which gavelkind lands descended and therefore expressly broke the descent. And furthermore the devise created a tenancy in common, which could not be by descent; added to which there were words of limitation in fee engrafted on the words *heirs of the body*. (*o*)

The above cases may serve as examples to shew the extent as well as the modifications of the rule commonly termed the rule in Shelley's case, where the same has been considered in relation to limitations of the legal estate: but it is due to the consistency of the Courts of Equity to observe that devises of estates in trust, where

(*n*) Lawe *v.* Davies, 2 Lord Raym. 1561.
(*o*) Doe *v.* Laming, 2 Burr. 1100.

the interest, according to the testator's intention, has taken immediate effect by force of the limitation, have received a construction conformable to the principles by which the decisions at law have been governed, in reference to the operation of the above rule; a distinction being taken between trusts intended to have immediate effect by virtue of the devise working through the medium of the established rules of equity, and which maintain a parallelism with the rules of law, and those trusts which depend for their accomplishment upon some future acts to be performed in pursuance of clauses in wills or articles directory of the same, which are usually denominated executory trusts.

The following cases will shew the equitable construction of executory trusts in a will.

Of the equitable construction of executory trusts in a will; and of the difference between such trusts, and trusts executed.

S. devised lands to trustees to pay her *debts* and legacies, and *then to settle* the remainder; one moiety *on her son Henry and the heirs of his body*, by a second wife, and in default of such issue to her son Francis, and the heirs of his body, the other moiety to Francis and the heirs of his body, with remainders over; and directed that it should never be put in the power of either to dock the entail. It was decreed that the sons should be only tenants for life, without impeachment of waste; and should not have an estate tail conveyed to them, notwithstanding the express words of limitation. (*q*) The foundation of which decree was, that the estate was not executed, but only executory; and that therefore the intent and meaning of the testatrix was to be pursued. She had declared her mind to be that her sons should not have power to bar their children, which they would have if an estate tail were to be conveyed to them. And it was said to be as strong in the case of such an executory disposition for the benefit of the issue, as if the like provision had been contained in marriage articles. But had she by her will devised to her sons an estate tail, the law must have taken place, notwithstanding any subsequent

(*q*) Leonard *v.* the Earl of Sussex, 2 Vern. 526.

clause or declaration in the will, that they should not have power to dock the entail. And this agrees with, and well explains, what was said by Lord C. Harcourt in Bale *v.* Coleman, that "the intent must be construed according to what appears upon the will, and *according to the known rules of law.*"

Thus it appears that the decision in the case just above stated was grounded upon the latitude afforded to the Court to interfere in moulding the settlement of which the will was *directory*, according to the spirit, though with some departure from the letter, of the will. But where the devise is *immediate* in its operation, not directing a settlement, but settling the estate by positive limitations, even though the subject of the devise is a trust estate, such equitable limitations may be considered subject to the same strict construction as legal estates; and afford no room for the exercise of judicial discretion by departing from the letter of the will to effectuate the general and presumable purposes of a settlement. And such appears to have been the principle which governed Lord Harcourt in his reversal of the decree of Lord Cowper in Bale *v.* Coleman. (*r*)

In that case the testator devised to trustees and their heirs for payment of debts and legacies; and after debts and legacies paid, willed that one fourth part should be and remain *in trust* for E. for life, with power of leasing; and after her decease *in trust* for C. for and during the term of his life, with like power of leasing; and after his decease to the heirs male of the body of C., remainder over. This being the devise of a trust, Lord Cowper conceived that it differed from an immediate devise; and that it was rather to be looked upon in the nature of an *executory* devise, to take effect after debts paid, or in the nature of marriage articles. Besides that, the enabling C. to make leases seemed to imply very strongly, that he was to have no power to dispose of the inheritance.

(*r*) 2 Vern. 670.

But the same cause coming on before Lord Harcourt, upon a rehearing, he said the case of a will differed from the cases of marriage articles, in the nature of which the issue were particularly considered, and looked upon as purchasers. That in cases of a will, where the parties claim voluntarily, *the testator's intent must be presumed to be consistent with the rules of law;* and that at law the same words would certainly create an estate tail. That it could not be inferred with any certainty from the power of leasing, that no estate tail was intended, such power being more beneficial than that which was given to a tenant in tail by the statute; and as the debts were admitted by the pleadings to be all paid, the same construction was to be made as if there had been originally no trust. His Lordship, upon these grounds, decreed A.'s share to be conveyed to him and the heirs male of his body.

We do not find the distinction alluded to in the above case, which has been so frequently recognized in other cases, namely, between executed and executory trusts: but on the negative side as denying to executed trusts a greater latitude of construction than is conceded in the limitations of legal estates, Lord Harcourt's doctrine has the support of a very prevailing series of authorities.

Lord Harcourt, indeed, was not called upon to make any distinction between trusts executed and immediate, and trusts executory and prospective, as the trusts in the case before him were undoubtedly of the former kind: and his decision proceeded upon the analogy between these trusts and limitations of the legal estate. Instead of simply denying the resemblance of these executed and completed estates in equity to the case of articles directory of a future settlement, he takes a spurious ground by insisting on the propriety of a severer construction of wills than of marriage articles, drawn from the distinct natures of the instruments themselves, which would extend such severe construction to executory as well as to executed trusts if contained in a will.

The distinction between these two descriptions of

trusts has been the hinge on which a great many important and much considered adjudications have turned; and without resorting to which we should in vain search for a principle to reconcile the cases on the subject. In the case of the Earl of Stamford *v.* Lord Hobart, (s) determined by Lord C. Cowper, whose decree was affirmed by the Lords, the opinion of Lord Harcourt as to the propriety of putting a stricter construction in general upon wills than marriage-articles was implicitly denied. It was there observed that, as it was usual for equity, in cases of executory articles for settling of estates, to supply informalities and defects, especially when the things supplied were necessary to support the main intent of the parties, and to carry such articles into execution, according to that intent, as far as it might agree with law, though not strictly according to the words and penning of the articles: so *à fortiori* would equity make a similar allowance in the case of a will, where the same was to be executed by a conveyance to be made.

If the view of this doctrine taken in the last cited case be a correct one, Lord Harcourt's general reasoning from the distinct characters of the instruments themselves, the one, *i. e.* marriage articles being considered as standing on obligatory and valuable considerations, the other on the mere intention and voluntary bounty of the testator, seems to have gone too far, and further than was necessary for the support of his decision of the case before him; there being quite sufficient ground for it in the analogy between trust estates executed or fully limited, and estates at law, and in the sound intelligible maxim of *equitas sequitur legem.* This point seems more worthy of being insisted upon, because in the learned and elaborate discussion of these cases by the late Mr. Fearne, that profound writer seems to lend some countenance to this mode of treating the subject.

(s) 1 Bro. P. C. 288.

The strict consideration of trust estates which was the ground of the decision in Bale *v.* Coleman was fully adopted by Lord Hardwicke in Garth *v.* Baldwin. (*t*) In which case there was a devise of lands to a trustee in trust to pay the rents and profits to S. for her separate use for her life, as if she were sole; and after her decease to pay the same to E. her son for life, and afterwards to pay the same to the heirs of his body; and for want of such issue, to pay the same to all and every other son or sons of the body of S. begotten, &c. Upon the question whether E. was entitled to the lands in tail, or for life only, Lord Hardwicke proceeded on this principle, namely, that in limitations of a trust either of a real or personal estate to be determined in that Court, the construction ought to be made according to the construction of limitations of a legal estate, unless the intent of the testator or author of the trust plainly appears to the contrary. He laid it down as a maxim, that he was not, in a court of equity, to overrule the legal construction of the limitation, unless the intent of the testator or author of the trust appeared by declaration plain, *viz.* by plain expression or necessary implication. And accordingly he decreed a conveyance in tail to E.

It could scarcely have been expected that after the decree of Lord Hardwicke in Bagshaw *v.* Spencer, (*u*) his Lordship would have reasoned, as we find him doing in Garth *v.* Baldwin just above cited: for in Bagshaw *v.* Spencer, the expressed ground of the decision was the distinction between a trust in equity, and a mere legal estate; his Lordship at the same time declaring that *all trusts* in notion of law were *executory*, and that the distinction between trusts executed and executory had never been established.

In the case of Roberts *v.* Dixwell (*v*) Lord Hardwicke observed, that the latter part of the trust was merely executory, to be carried into execution after

(*t*) 2 Ves. 646. (*u*) 1 Ves. 142. 2 Atk. 246. 570. 577.
(*v*) 1 Atk. 607.

the performance of the antecedent trusts. That the whole direction, therefore, fell upon the Court; and they were to direct how the parties were to convey. He said, that the Court had taken much greater liberties in the construction of *executory* trusts, than where the trusts were actually executed; and directed a conveyance to the sons successively in tail, it being not a trust executed, but executory.

Thus, notwithstanding the reasoning of Lord Hardwicke in Bagshaw *v.* Spencer, he will be found, in other cases decided by him both before and after that case, to have upheld by his authority the distinction taken by Lord Talbot in Lord Glenorchy *v.* Bosville (*x*) which may be considered as the great case upon the subject. The devise in that case was to trustees and their heirs, in trust till the marriage, or death of the testator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance; and, as to the residue, to pay his debts and legacies; and after payment thereof, in trust for his grand-daughter; and if she married a Protestant, after her coming of age, or with consent, then to convey the estate after such marriage, to the use of her for life, without impeachment of waste, remainder to her husband for life, remainder to the issue of her body, with several remainders over. And one of the questions was, whether Lady Glenorchy, (the grand-daughter) under this will was tenant for life or in tail. Lord Talbot said he should have made no difficulty of determining this to be an estate tail, had it been the case of an *immediate* devise. He thought that, in cases of trusts executed, or immediate devises, the construction of the courts of law and equity ought to be the same; for there the testator did not suppose any other conveyance would be made: that the case of Papillon *v.* Voice (*y*) seemed a strong authority for executing the intent in executory trusts, as well as in marriage articles; and he accordingly decreed to Lady Glenorchy an

(*x*) Ca. temp. Talb. 3. (*y*) 2 P. Wms. 471.

estate for life with remainder to her first and other sons in tail male, &c.

It would be useless to cite more cases upon this subject. All of them which had taken place before and during his time have been collected, and reasoned upon, by Mr. Fearne in his Essay on Contingent Remainders; whose opinion was strongly in favour, as well of the close analogy between trust estates executed and legal estates, as of the distinction between executed trust estates and trusts executory, which latter leave something to be done on which a court of equity may ground its special interference to carry the intent of a testator into full effect. We may conclude with observing, that Lord Thurlow in Jones *v.* Morgan (*z*) adhered to the principle of applying the same rules to trust as to legal estates where the devise *is immediate*; and that Lord Eldon, in the important case of *the* Countess of Lincoln *v.* the Duke of Newcastle, (*a*) said, that there is a distinction between a will making a direct gift, and a covenant by articles to be executed; but none between a covenant in consideration of marriage, and an executory trust by will.

A limitation importing an estate in tail general may by subsequent words be confined to the heirs in tail male.

What would otherwise be an estate tail general may, by subsequent words, be confined to the heirs in tail *male*. As if a man devise lands to his wife for her life, and after her decease to her son, and if he dies without issue, *having no son*, that then J. S. shall have it; the son, by this devise, takes an estate in tail *male*; for though the devise to the son, and if he die without issue, would have been a good tail general, yet when the devisor added the words "having no son," he thereby explained what issue he intended should inherit the land. (*b*)

Estates tail may arise in a will by implication merely, and without any express words of devise.

It has already sufficiently appeared that devises regularly passing estates for life may be enlarged so as to give estates of inheritance, and that words giving the fee simple may be restrained to estates tail, by implica-

(*z*) 1 Bro. C. C. 206.
(*a*) 12 Ves. Jun. 218.
(*b*) 1 Roll. Abr. 837.

tion arising upon subsequent expressions: but there are cases which carry the principle still farther; for an estate tail may sometimes arise by the mere force of implication, without any express words of devise to the party himself, upon the principle of so construing the words of a testator as to give a legal effect to his intent.

Thus in the case of Walter *v.* Drew, (*c*) where a testator, having two sons, devised his lands to his second son and his heirs, if his eldest son should happen to die and leave no issue of his body, lawfully begotten, it was held that the eldest son took an estate tail by implication; for otherwise the limitation to the second son would have been an executory devise, which, being limited to take effect upon an indefinite failure of issue of the elder brother, would have been void as being too remote.

Thus, also, in a case in Dyer, (*d*) a testator, having two sons and a daughter, devised his land to the younger son and his heirs; and if both of his two sons should die without issue, remainder to the daughter. The younger son died, and then the testator died: and it was held that the daughter took a good remainder. But to make it such, the elder brother was adjudged to take an estate tail by implication of law; for if he had taken no estate, then the limitation to the daughter would have been an executory estate, limited to take effect after the indefinite failure of issue of the elder brother, and consequently void as being too remote.

So where a testator devises land to his heir at law, after the death of his wife, as the heir at law is plainly excluded during the life of the wife, unless the wife takes it nobody can; and thus it would be *in nubibus* till the wife's death. Therefore, to avoid this consequence, the wife takes an estate for her life by implication.

In the case of Willis and Lucas (*e*) a testator, having

(*c*) Com. Rep. 372. (*d*) P. 330. (*e*) 1 P. Wms. 471.

two sons, devised his lands to the younger son for his life, he and his heirs paying thereout a rent to the elder brother during his life; and after the death of the younger son, *and also* of his wife, to the first and other sons of the younger son in tail. The younger son died; and the question was whether his wife took any estate; and it was held she took by implication an estate for her life; and the ground upon which it was so held was the plainly intended exclusion of the heir by the devise of a rent to him during his life.

In Goodright *v.* Goodridge, (*g*) J. G. having two sons, Richard and John, devised all his lands to his wife for life, and then proceeded thus,—"And my will is, that if my son Richard do happen to die without heirs, then my son John shall enjoy my lands;" and the Court held that Richard took an estate tail by implication.

After a devise to A. and his heirs, a remainder over, upon A.'s dying without heirs, is generally void. But if such remainder be to a person who might inherit to A., the words 'without heirs' will be construed heirs of the body.

There can be no regular remainder limited after a fee-simple: therefore, where an estate is devised to one and his heirs, and that if he dies without heirs, it shall remain over to another, this last limitation is void. (*h*) Nor can the law help such a devise by any construction for which the will itself does not afford some argumentative support. But where the limitation over is to one who is a collateral heir of the devisee, the testator is construed to mean by the word *heirs* heirs of the body, and the first devisee takes only an estate tail; for it is not possible that he can die without an heir, while the person to whom the remainder is thus limited, or his issue, continue in existence.

Accordingly, where a testator devised his houses to Francis his son, after the death of his wife; and if his three daughters, or either of them, should survive their mother, and Francis their brother, *and his heirs*, then, that they should enjoy the same houses for the term of their lives: it was resolved that Francis the son had but an estate tail under this will; for by '*heirs*,' in this place, was intended '*heirs of the body*,' because, the

(*g*) Willes 369. (*h*) Co. Lit. 18. a. Vaughan 269.

limitation being to his sisters, it was necessarily to be intended that it was, if he should die without issue of his body, for they were his heirs collateral; and the intention being collected by the will, the law should adjudge accordingly. (*i*)

The construction is the same where the remainder is limited to the heirs of the testator himself.

And the same construction prevails where the remainder is limited to the heirs of the testator himself; if such heirs must also be heirs of the first devisee. Thus in Nottingham *v.* Jennings, (*k*) where a person, having issue, three sons, John, Francis, and William, devised his land to Francis and his heirs, and for default of heirs of Francis, to the heirs of the devisor: it was said by Holt C. J. that as the testator had devised that his own right heirs should take after the death of Francis, without heirs, although his own right heir would take nothing by the devise, (for he would take by descent), yet that circumstance shewed the testator's intention to have been that, upon the death of Francis *without issue*, the eldest son should take; and that, therefore, the word *heirs* must be construed to mean *issue*, because Francis could not die without an heir as long as the testator had an heir.

But where the devise was to one and his *heirs*, and if he died *without heirs*, then to a charity; this devise over was held to be void. (*l*) And again, where the testator devised to his son and his *heirs*, and if he should die *without heirs*, remainder over to another who was half-brother to the first devisee: upon a question made, whether the first limitation was in fee or in tail, Lord Hardwicke said it was a plain case, and one of those points which the Court would not suffer to be argued, as having been determined before; for this was a devise over to a stranger, as the law considered him, and who would not in any event inherit as heir to his brother. (*m*)

(*i*) Webb *v.* Hearing, Cro. Ja. 415. and see Tyte *v.* Willis, Ca. temp. Talb. 1. Morgan *v.* Griffiths, Cowp. 234.

(*k*) Com. Rep. 82. (*l*) Attorney General *v.* Gill, 2 P. Wms. 369.

(*m*) Tilbury *v.* Barbut, 3 Atk. 617.

Of the implication of cross remainders.

Cross remainders, or reciprocal expectancies, in succession, between several persons, to and amongst whom an inheritance in land is originally devised, are also interests which may arise in a will without express limitation, by force of the implied intention of the testator; though it is a settled rule that they can only be created in a deed by express limitations. (*u*) The formal limitation, which it is safest to adopt both in wills and deeds, runs as follows:—"To the use of all and every the sons or daughters, &c. (as the case may be) and of the heirs of their respective bodies issuing, share and share alike as tenants in common; and in case there shall be a failure of issue of the body or bodies of any of such sons or daughters, then as to the part or parts, as well accruing and surviving as original, of such of them whose issue shall so fail, to the use of the survivors or survivor, and other or others of them, equally to be divided between them if more than one, share and share alike, as tenants in common, and to the several and respective heirs of the body and bodies of such surviving and other son or sons, daughter and daughters; and if all such sons or daughters shall die without issue, or there shall be but one such son or daughter, then to the use of such one son or daughter, and the heirs of his or her body." This formal language, however, is not indispensable in a deed; and so long as the limitations are described substantially, and in terms, it matters not, though the terms are informal, and to a certain degree incorrect. (*v*)

Changes in respect to the rule of presumption.

In a will, cross remainders may be implied without any express limitations, where there is evidence furnished by the tenor of the instrument, to shew that it was the testator's intention that the estate should go in that course of succession. But it has been said that the law never favours cross remainders even between two

(*u*) Cole *v.* Livingston, 1 Ventr. 224. Doe *v.* Dorvell, 5 T. R. 521.

(*v*) Doe *v.* Wainwright, 5 T. R. 427

persons only; and that between more than that number, they could not, under any circumstances, be implied, (*u*) on account of the confusion that would be likely to arise from the division of the estate among so many, and the uncertainty as to what interest would vest in the survivors. (*x*) But this exclusive doctrine has received considerable qualification; and the following distinction has since prevailed, *viz.* "That the presumption is in favour of cross remainders between *two* and no more; but where the question arises, whether cross remainders are to be implied between *more than two*, they are rather to be presumed *against*, although such presumption against them may be answered by circumstances plainly indicating a general intention which cannot be satisfied but by the construction of cross remainders." And this seems to be nothing more than a return to good sense and ancient law; for in Clache's case,(*y*) 13 Eliz. where a man, having issue *five* sons, devised lands to his four younger sons and the heirs male of their bodies; and if they all died without issue of their bodies, or any of their bodies, that the lands should remain to his right heirs: it was held that no part should revert as long as any of his sons had issue male.

The more modern cases have confirmed the doctrine of the case in Dyer; and whether cross remainders are to be inferred where the question regards more than two persons, seems now to depend upon the same general principle of effectuating the testator's intention, as in all other questions of construction upon wills.

A person devised land to his four sisters and a niece for their lives, share and share alike, as tenants in common, and not as joint-tenants; remainder to

(*u*) 2 Roll. Rep. 282. Gilbert *v.* Whitty, Cro. Jac. 655. Davenport *v.* Oldis, 1 Atk. 579, 580. *per* Lord Hardwicke.

(*x*) Holmes *v.* Meynel, Sir Thos. Jones 173.

(*y*) Dyer 303. b.

their daughters in tail, the reversion to his own right heirs. (z)

Lord Mansfield said, that wherever cross remainders were to be raised by implications between two and no more, the presumption was in favour of cross remainders; where they were to be raised between more than two, there the presumption was against cross remainders; but that this presumption might be answered by circumstances of plain and manifest intention either way. That this was a qualification of the rule laid down in former cases; which seemed to say that there should not be cross remainders between more than two: but the true rule was to take it with the qualification above stated. The presumption was against cross remainders, and judgment was accordingly given, that in the case before the court there were no cross remainders.

A devise was in these words:—"To the use of all and every the daughter and daughters of the body of P. H., and to the heirs of her and their body and bodies lawfully issuing; such daughters, if more than one, to take as tenants in common, and not as joint-tenants; and, for default of such issue, to the right heirs of the devisor for ever." There were two daughters; and one of them having died an infant, the question was whether her sister became entitled to her moiety. A case being sent out of the Court of Chancery for the opinion of the Judges of the King's Bench, the certificate was:—"There are no words in the instrument which intimate any intention to limit over the *respective* shares of the two daughters dying without heirs of their bodies respectively: on the contrary, the limitation over is of the whole estate, limited to all the daughters, and is to take place on the express contingency of failure of all and every the daughter and daughters, and the heirs of their body and bodies; and the limitation over on default of such issue is to the heir at law. Conse-

(z) Perry v. White, Cowp. 777.

quently, we are of opinion that as nothing is given to the heir at law, whilst any of the daughters or their issues continue, they must among themselves take cross remainders." (*a*)

George Phipard devised all his lands, situate, &c. to his brothers William and John, and his sister Elizabeth, and the heirs of their bodies, as tenants in common, and not as joint-tenants; and, for want of such issue, to his own right heirs for ever; and gave all the residue of his goods and chattels, as well real as personal, to his said brothers and sister, to be equally divided between them. Upon a case out of Chancery, Lord Mansfield said, "the reason given in the old cases against raising cross remainders, to prevent the splitting of freeholds, had not very great weight at the time it was given, and certainly has none now. Where they are to be raised between two, and no more, the favourable presumption is in support of cross remainders; where between more than two, the presumption is against them: but the intention of the testator may defeat the presumption in either case.

In general, in devises of this kind, the intention of the testator is in favour of cross remainders. But there must be some circumstances manifesting such intention. In the present case, the testator had two brothers and a sister: if he meant his estate should have gone to his heir at law, there was no occasion to make a will; therefore, it is clear he did not mean his brother John should take as heir, or that William should do so. But he meant that his sister should be equally an object of his bounty. It was clear that he meant no division should take place to create any inequality between them till a failure of the heirs of *all* their bodies. He therefore began with the disposition

(*a*) Wright *v.* Holford, Cowp. 31. reported by the name of Wright *v.* Englefield, Ambl. 468.

thus: "As to *all* my temporal estate, I give *all* my lands to my two brothers and my sister, and to the heirs of their bodies lawfully begotten."

These were the words of an ignorant man, and the will was inaccurately drawn; for there could not be a limitation to two brothers and a sister, and to the heirs of their three bodies. The Court, therefore, must mould them as near to the intent of the testator as they can. The lands were equally to be enjoyed by his brothers and sister, and the heirs of their bodies.

It was impossible to have expressed his intention, that his sister should take equally with his brothers, more plainly. He meant his estate should continue fettered with an intail, during the existence of the persons then in being, and their issue; and that his heir at law should take nothing till after that intail was determined; whereas, if the construction were to be, that the heir at law should take upon the failure of issue of any one, the elder or the younger brother, as the case might happen, would then take a fee in the share of the deceased brother or sister, and so create an inequality which the testator never intended to make: for it was limited to them and the heirs of their bodies, and for want of such issue: by which words were plainly meant issue of all of them. How could it then be executed, but by raising cross remainders? It seems to be as strong a case as that of Wright *v.* Holford." The other Judges concurred, and the Court certified that the words of limitation created cross remainders. (*b*)

T. B. being seised in fee, devised all his manors, &c. to all and every the daughter and daughters of the body of his daughter Martha, and the heirs male of the body of such daughter or daughters, equally between them if more than one, as tenants in common, and not as joint-tenants; and, for default of such issue, he gave and devised *all his said premises* unto his right heirs for ever. Upon a case sent out of Chancery for the opi-

(*b*) Phipard *v.* Mansfield, Cowp. 797.

nion of the Judges of the King's Bench, Lord Kenyon said, that as between two only it should be presumed that cross remainders were intended to be raised; but if there were more than two, it was necessary to resort to other words in the will to discover an intention to raise cross remainders: but, here, there was no doubt, from the words of the limitation over, but that the devisor intended to raise cross remainders between the grand-daughters. The testator clearly intended that the whole should go together; whereas, if no cross remainders were raised between the grand-daughters, it would go to the right heirs by separate portions on the death of each grand-daughter. (*c*)

Mr. Justice Buller said this was a stronger case for raising cross remainders than that of Phipard *v.* Mansfield; for here, besides the words, 'for default of such issue,' namely, issue of all of them, the devise over is of *all* the devisor's estates. Now, they could not all go together, but by making cross remainders between the grand-daughters.

The Court certified that the daughters of Martha took estates in tail male with cross remainders.

A person devised an estate to all and every the younger children of Mary Foxon, begotten or to be begotten, if more than one, equally to be divided among them, and to the heirs of their respective body and bodies, to hold as tenants in common, and not as joint-tenants. And if the said Mary Foxon should have only one child, then to such only child, and to the heirs of his or her body lawfully issuing; and, for want of such issue, he gave and devised the said premises to C. N. The question was, whether cross remainders were raised between the younger children of Mary Foxon. (*d*)

Lord Kenyon said, that where cross remainders were to be raised by implication between two, and no more,

(*c*) Atherton *v.* Pye, 4 Term Rep. 710.
(*d*) Watson *v.* Foxon, 2 East R. 36.

the presumption was in favour of cross remainders; where they were to be raised between more than two, the presumption was against them: but that presumption might be answered by circumstances of plain and manifest intention either way. Whatever was declaratory of the intention of the party, he took to be expressed. No technical words were necessary to convey an intention: but if, taking the whole instrument together, there was no doubt of the party's meaning, the Court arrived at the conclusion. Now, here the testator set out with devising *all* his farm, &c. to his daughter and grand-daughter for their lives; remainder, after the death of the survivor, to all and every the younger children of Mary Foxon, if more than one, equally to be divided amongst them, and the heirs of their respective body and bodies as tenants in common; and, if only one child, then to such only child, and the heirs of his or her body, &c.; and for want of such issue he gave and devised the said premises to his son-in-law, C. N. (what he meant by the *said* premises was evident, and could not have been rendered clearer by saying, *all* the said premises, though it might have served to multiply words.) Then, after several limitations, and for want of such issue, he proceeds to divide the estate into thirds, to go to different persons: till then the entirety of the estate was to be preserved, and all was to go over at the same time. But great stress was laid here upon the word *respective*, as disjoining the title; and the authority of Lord Hardwicke was referred to in the cases mentioned. No person regarded whatever fell from that great Judge with more reverence than he did: but it was unworthy of his great learning and ability, to lay such stress, as he was stated to have done, on the word 'respective.' Creating a tenancy in common divided the title as much, whether the word 'respective' was used or not. And as to what might have been said by other Judges, with reference to the opinion delivered in Comber *v.* Hill, (*e*) and Da-

(*e*) 2 Strange, 969.

venport *v.* Oldis, in subsequent cases where the word 'respective' did not occur; feeling themselves right on the principle on which they proceeded, it was not to be wondered at, that they were desirous of relieving their own minds from the weight of Lord Hardwicke's opinion: but it was too much to infer from thence that those Judges, therefore, approved of his opinion, or that their judgments were governed solely by that consideration. In the case of Atherton *v.* Pye, (*f*) the devise over, in default of such issue, was of *all* the testator's said lands: and stress was laid by some of the Judges on the word *all*, in support of cross remainders between the issue, he would not say by implication, but by what the Judges collected to be the intention of the testator. But the word *all* was not decisive of that case, and, in truth, made no difference in the sense; for a devise over of *the said premises*, or *the premises*, or *all the said premises*, meant exactly the same thing. Admitting, therefore, the general rule, that the presumption was not in favour of raising cross remainders by implication between more than two, still that was upon the supposition that nothing appears to the contrary from the apparent intention of the testator. He had no doubt here, but that the testator intended to give cross remainders among the issue of M. F. The devise over of the *premises* meant *all the premises*. He intended that *all* the estate should go over at the same time. He thought Lord Mansfield's quarrel with Davenport *v.* Oldis (*g*) well founded; and he agreed with the cases of Wright *v.* Holford, (*h*) and Phipard *v.* Mansfield; (*i*) from which he could not distinguish this case. He was clearly of opinion, that the intention of the testator was the polar star, by which the Court should be guided in the construction of wills, where no law was infringed, &c. Here the intention was clear to give cross remainders. The other Judges concurred; and judgment was given accordingly.

(*f*) *Vid. supra*, 513.
(*g*) *Vid. supra*, 509.
(*h*) *Vid. supra*, 510.
(*i*) *Vid. supra*, 511.

The doctrine of opposing the implication of cross remainders between more than two, has given way to the principle of consulting the testator's intention.

Thus it appears, that, by a series of weighty decisions, the doctrine of opposing the implication of cross remainders between more than two has entirely given way to the principle of consulting the testator's intention, without regard to technical phraseology. If the object of the testator by the limitation over, after the devise to the persons before-named to take as tenants in common in tail, appears to be *to limit* the estate entire and unbroken to those in remainder, after the failure of all the issues of the persons previously entitled as tenants in common, to effectuate that intent cross remainders will be implied among such tenants in common. And very slight verbal particularities have been considered as marks of such intention. Thus in Roe *v.* Clayton, (*f*) it seemed to weigh much with the Court that the limitation over was a devise of *all* the estate. And in the subsequent case of Doe d. Gorges *v.* Webb, (*g*) where the testatrix devised the premises to her daughters as tenants in common, and the heirs of their bodies, and in default of such issue, gave the *same* to her own right heirs for ever; the word 'same' was considered as shewing that the testator meant to give all together to the devisee over.

In a late case in Chancery, (*h*) however, Lord Eldon did not seem to think the reasoning from these expressions, *all*, or *all the premises*, or *the same*, very satisfactory. But his Lordship fully adopted the opinions of the Judges in the later cases, as to the improper stress laid by Lord Hardwicke, in Davenport *v.* Holdis, (*i*) on the purport of the words *several and respective* in the devise to the persons and their issues in tail; since the words "to take as tenants in common" do equally without these words import estates in severalty; and the estates of tenants in common do, as

(*f*) 6 East, 628. (*g*) 1 Taunt. 234.

(*h*) Green *v.* Stephens, 17 Ves. J. 64.

(*i*) 1 Atk. 579, 580. See also Comber *v.* Hill, 2 Strange, 969. and Williams *v.* Browne, 996.

such, without more words, descend to their issues respectively.

Upon the whole it may be doubted whether, consistently with the spirit of the modern cases upon this subject, which evidently shew a strong disposition to take cases out of the influence of the supposed rule of presumption against the implication of cross remainders between more than two, such distinction between the cases grounded on the difference of number has in reality any longer a practical existence; for it will be difficult to understand the proposition that the courts lean one way, and the presumption of law another. And it must be difficult, if not impossible, to apply this supposed difference of presumption to those numerous cases where the devise is not to individuals named and ascertained, but to the future children of persons having none at the time of the devise; for if these presumptions are to be considered as founded upon the intention of the testator, such intention in the case last supposed must be inferred as provisionally and prospectively contemplating the alternative of the objects of the devise being two and no more, or above that number, and calling for a different construction as the event may shape the case.

SECT. VII.

By what words an Estate for life only will pass.

IT seems to be a safe and fundamental principle in the construction of limitations in wills, that it shall be made according to the rules of the common law in respect to estates limited or conveyed by deeds, unless there is something clearly to be collected from the will itself, disclosing a different intention in the testator (1). And it will be

(1) Carth. 5. per Bridgman, C. J. who cites Wild's case, 6 Rep. 16. in support of the position.

useful as a check upon the zeal sometimes discovered for executing the supposed intention of a testator, to remember Lord Chancellor Harcourt's observation in Bale *v.* Coleman, (*a*) that the intent which ought to govern must be a certain and manifest intent, and not an arbitrary one; it must be according as it appears upon the will, and according to the known rules of law;—it is not to be left to a latitude, and as it may be guessed at."

Where there are no words giving an inheritance, or plain grounds for inferring an intention so to do, the devisee takes only an estate for life.

If there are no expressions in a will giving in direct terms an estate of inheritance, nor any plain grounds for inferring an intention to give such estate, nothing passes away from the heir at law beyond an estate for life. Therefore, as before has been observed, a devise of land to a person generally (*b*) disposes of nothing but an estate for the life of the devisee, and the addition of the word 'assigns' will not enlarge it. Accordingly, if a man devise in the following manner, (2) "I devise Black Acre to my daughter F. and the heirs of her body begotten; *Item*, I devise to my said daughter White Acre;" the daughter shall have but an estate for life in White Acre; for the word '*item*' has not the force of the words 'in the same manner,' or '*in formâ prædictâ*,' which would be tantamount to repeating the words of limitation.

And if a man, seised in fee of a house and land, makes his will in this manner, "I devise the moiety of my house to my wife for her life; *Item*, I devise the

(*a*) See Vin. Abr. tit. Dev. (D. b) 7.
(*b*) Fairfax *v.* Heron, Prec. in Ch. 68.

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(2) Vin. Abr. tit. Dev. (Q. a). But if a man devise Black Acre to one in tail, and also White Acre, the devisee will have an estate tail in White Acre also, for this is *all one sentence*, *ibid.* And so it has been held that if in the first clause *no devisee is named*, as where a testator says, "*Item*, I give the manor of D., *Item*, I give the manor of S. to J. K. and his heirs," this shall be referred to both the manors, and J. K. will have the fee in both. *Ibid.*

other moiety of my house to J. S.; *Item*, I devise to J. S. all the said house, and all the land that appertains to it after the death of my said wife:" J. S. will take only an estate for life in the premises after the death of the wife. (*c*)

So if I devise Black Acre to J. S., *Item*, I devise White Acre to J. S. and his heirs, it is only an estate for life in Black Acre; for the *item* has no dependence upon the first clause, but is distinct and several.

The cases of Denn *v.* Gaskin, (*d*) and Right *v.* Sidebotham, (*e*) have been already produced as instances of the rule which will not suffer a greater estate than for the life of the devisee to pass by a will without proper words of limitation, or a plain indication on the face of the instrument of an intention in the testator to give an inheritance. The words of Lord Mansfield in the last-mentioned case are very declarative of the law on this subject.

"I verily believe," said his Lordship, "that almost in every case where, by law, a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance. 'All my estate,' or 'all my interest,' will do: but 'all my lands, lying in such a place,' is not sufficient. Such words are considered merely descriptive of the local situation, and only carry an estate for life; nor are words, tending to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else. I have no doubt but that the testator's intention here was to disinherit his heir at law, as well as in the case of Denn *v.* Gaskin: but the only circumstance of difference between that case and this, and which has been relied on as in favour of the defend-

(*c*) Vin. Abr. tit. Dev. (Q. a.) (*d*) Cowp. 657. *Ante*, Sect. 4.
(*e*) Dougl. 759. *Ante*, Sect. 4.

ants, if the testator had any meaning by it, (which I do not believe he had) rather turns the other way; because he uses different words in devising different parts of his estate. I think we are bound by the case of Denn *v.* Gaskin." Judgment that the widow took only a life estate in the premises.

So, in another case, where C. B., being seised and possessed of freehold and leasehold property, lying contiguous, and demised together, made his will and devised to his wife all his freehold and leasehold messuages, &c. and all his estate and interest therein, for and during her natural life, and after her decease, he devised the said messuages to his sisters-in-law, M. S. and M. B., as tenants in common; but in case his mother should give any disturbance to his wife, then his will was, that the same should go to his kinsman, W. B., *his heirs* and assigns for ever; and charged his estate with the payment of all his just debts, to be paid out of the yearly rents of his estates by his said wife. Lord Mansfield said, there were no words of limitation added to this devise; and, therefore, that it was clear, by the rule of law, that it was only an estate for life, unless it could be found from the whole of the will taken together, and applied to the subject matter of this devise, that the testator's intention was to give a fee; and, accordingly, judment that the sisters-in-law took only an estate for life. (*f*)

Sir R. Worsley, being seised in fee of the premises in question, devised them to trustees, upon trust that they should stand seised thereof, to the use of his grandson Robert, Earl of Granville, for life; remainder to his first, and other sons in tail male; remainder to Lady Carteret for life; remainder to her first and every sons in tail male; and in default of such issue, "to the use of all and every the daughter and daughters of the body of the Lady Carteret, lawfully issuing, as tenants in common, and not as joint-tenants; and, in default of such issue, to the use and behoof of his own right heirs for ever. (*g*)

(*f*) Roe *v.* Blackett, Cowp. 235.

(*g*) Hay *v.* Earl of Coventry, 3 Term Rep. 83.

Lady Carteret had one daughter, Lady Catherine Hay; and the question was, what interest she took under this devise? A case was sent out of Chancery to the Court of King's Bench, for their opinion.

Lord Kenyon—The general rule which is laid down in the books, and on which alone courts can with any safety proceed in the decision of questions of this kind, is, to collect the testator's intention from the words he has used in his will, and not from conjecture. It is not necessary that any technical or artificial form of words should be used in a will: but we must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used. The objection then occurs in this case, "*voluit sed non dixit.*" The plaintiff's argument goes to shew, that the daughters took estates in tail general: but that could not have been the intention of the devisor, as no such estate is given in any part of the will, and the devisor has totally laid aside the daughters of the first devisee, and the daughters of his sons. The words here used, technically considered, only confer an estate for life on Lady Catharine Hay. It has been argued that we may presume an intention in the devisor, from other parts of the will, to give estates in succession to the daughters; but I cannot find any words to warrant such a construction. If, indeed, the word 'such' had not been introduced into this clause, we might, perhaps, have said that, as 'issue' is '*genus generalissimum,*' it should include all the progeny: but here the word 'such' is relative, and restrains the words which accompany it.

The certificate was, that Lady Catherine Hay took an estate for life.

Where, though the land is charged, only a life estate passes.

With respect to the consequence of charging the estate with the payment of a gross sum of money, or of debts or annuities, it has been shewn upon what principle this is considered as conferring the fee-simple upon the devisee, without words of limitation. But it is laid down in Collier's case, that a devise to a person, to the intent that with the profits he should educate his

daughter, (*h*) or out of the profits of the land, pay to one so much, and to another so much, was but an estate for life, for he was sure to have no loss. (*i*) A distinction which has ever since been acknowledged, though the Courts have occasionally felt themselves embarrassed in the application of it. Where a testator devised all his lands, tenements, and messuages, whatsoever, after his debts, legacies, and funeral expenses were discharged, to T. M.; it was said by Fortescue, M. R. that here the debts were not *at all events* charged upon the real estate, but only contingently, if the personal estate should be deficient; and therefore it did not come up to the cases cited of a gross sum to be paid out of land, and consequently gave no more than an estate for life to the devisee. (*k*)

And in another case, where a testator devised as follows:—"I give and devise unto N. Lister all that my customary estate, &c. and all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever, and wheresoever; and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts and funeral expenses, I give, devise, and bequeath the same unto my sister Sissily Carr," and appointed her sole executrix; the question was, whether Sissily Carr took an estate in fee or only for life. (*l*)

Lord Kenyon said that where a devisee is directed to pay an annual rent charge, or a solid sum to another person, out of the estate devised, it had been properly decided that the devisee should take a fee, because he might be a loser unless the estate in his hands were at all events sufficient to enable him to bear those charges. Where a sum of money was given, it might be payable before the rents became due; and where an annual charge was made on the estate, it might continue beyond the life of the devisee; and, therefore, it was ne-

(*h*) Bacon *v.* Hill, Cro. Eliz. 497.
(*i*) 6 Rep. 16. a. (*k*) Merton *v.* Blackmore, 2 Atk. 340.
(*l*) Denn *v.* Mellor, 5 Term Rep. 558.

cessary, in both those cases, that the devisee should have a permanent fund. This case had been compared to that of Doe *v.* Richards: (*m*) but there the words were, "my legacies and funeral expenses being thereout paid;" which imported that those sums were to be paid by the devisee out of the interest given to her: and if she had died immediately after the devisor, and had only taken a life estate, the fund out of which she was to bear those charges might have failed. The Court was therefore compelled to make that decision, and he was now perfectly satisfied with it: but, in the case before the Court, the words of the will were, "after payment of my just debts and funeral expenses." Now, supposing the devisor had, in the beginning of the will, charged his debts and funeral expenses on his real estate; and had then, after a series of limitations, devised to his wife, in the words now used; it could not have been contended, that such a charge on the real estates would have passed the fee to his wife; and if not, the place in which the same words were introduced, could not vary the question. He admitted that the real estate was charged with the payment of debts and funeral expenses, if the personalty was not sufficient for that purpose: but there were no words *charging the estate in the hands of the wife,* with the payment of those debts. This, therefore, essentially distinguished the present case from that of Doe *v.* Richards; for there the debts were to be paid by the devisee, and were a charge on the estate in his hands; whereas here, the debts were no charge on the devisee. Judgment was given, that Sissily Carr took only an estate for life.

On a writ of error in the Exchequer Chamber, this judgment was reversed, upon the ground that the words "all the rest of the lands &c." created an estate in fee. (*n*)

On being afterwards carried into the House of Lords, the following question was put to the Judges:

(*m*) 3 T. R. 356. (*n*) 1 Bos. and Pul. 558.

—"What estate the devisee Sissily Carr took in the premises in question?" And the Judges having taken time to consider the said question, the Lord Chief Baron of the Court of Exchequer delivered their unanimous opinion, that Sissily Carr took an estate for life in the premises in question. Whereupon the judgment of the Court of Exchequer Chamber was reversed, and the judgment of the Court of King's Bench affirmed.

Again, a testator made his will in these words:—"As to what real and personal estate it hath pleased Almighty God to bless me with, I give and dispose of the same as followeth. First, my will is, that all my debts and funeral expenses be justly paid off and discharged out of my personal estate; and if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever, situate, &c. unto William Allen of S., son of Thomas Allen of S. aforesaid deceased." The question was, What estate passed by these words? And Lord Kenyon said, that the debts were not at all events charged upon the real estate, but only contingently, if the personal estate should not be sufficient; and therefore did not come up to the cases cited of a gross sum to be paid out of the land, and, consequently, gave no more than an estate for life to the devisee; and judgment was given accordingly. (*o*)

(*o*) Doe *v.* Allen, 8 Term R. 497.

SECT. VIII.

What words create a Jointenancy, and what a Tenancy in Common in a Will.

Leaning of the courts in favour of a tenancy in common.

COURTS both of law and equity are said now to lean against jointenancy in the construction of a will; though formerly it was otherwise, upon the ground of the inconvenience of multiplying services under the old tenures. (*a*) Any words therefore, importing an equality of benefit, will lead to the construction of a tenancy in common; and the books abound in cases in which, where real or personal estate has been devised to two or more persons, the Courts have shewn a disposition to lay hold of any words in a will indicating an equal division of property, to raise a tenancy in common.

A man devised his lands to his wife for life, remainder to A., B., and C., and their heirs *respectively* for ever; and the question being whether A., B., and C., were jointenants or tenants in common, the Court held that they were tenants in common; for the intent of the devisor appeared in the will, that every one should have his part and his heirs. So here was a provision made for children; and the words *respectively* would be idle, if another construction were made. (*b*)

So where lands were devised to five persons, their heirs and assigns, *all of them to have part and part alike*, it was adjudged to be a tenancy in common. (*c*)

Again, where L. devised lands to his two sons *equally*

(*a*) 3 Atk. 524.

(*b*) Torrett *v.* Frampton, Style 434. and see Heathe *v.* Heathe, 2 Salk. 123.

(*c*) James *v.* Collins, Het. 29. Cro. Car. 75. and see Martin *v.* Wilson, 3 Bro. C. C. 324. Rose *v.* Hill, Burr. 1883.

and their heirs, it was adjudged that the devisees took as tenants in common; for otherwise the word *equally* would have no meaning. (*d*) And in another like case, Lord Mansfield said that the word *equally* implied a division; whereas, if they were to take as jointenants, there would be no division. (*e*)

A person devised a freehold to trustees and their heirs, in trust to permit his three sisters and their assigns to hold and enjoy the premises, and to receive the rents thereof to their sole and separate use; and as his sisters *should severally die,* he gave the premises to their several heirs. Lord Hardwicke held that the plain meaning of the words '*as they should severally die, &c.*" was that the sisters should take as tenants in common. (*f*)

And in another case, a devise of the *profits of land* in trust for the testator's six younger children, to be distributed among them in *joint and equal proportions,* was held to give a tenancy in common, and not a jointenancy. (*g*)

A testator devised all his real estates to trustees, as soon as his three daughters should attain their respective ages of twenty-one, to convey to them, *and the heirs of their bodies, and their heirs, as jointenants.* Lord Hardwicke, after observing that, on account of the direction to convey, this was an executory trust, in which case the Court assumed greater latitude in moulding the will according to the intention of the testator, gave his opinion that the daughters did not take as jointenants, but that conveyances should be made to them at twenty-one respectively, in tail, with cross remainders in tail; by which means survivorship would be preserved upon the death of any daughter without

(*d*) Lewen *v.* Cox, Cro. El. 693. 1 Vern. 32.

(*e*) Denn *v.* Gaskin, Cowp. 659. and see Blisset *v.* Cranwell, Salk. 226.

(*f*) Sheppard *v.* Gibbons, 2 Atk. 441.

(*g*) Ettricke *v.* Ettricke, Ambl. 656.

issue, which was the most that was meant by jointenants. (*h*)

Again T. S. devised a term for years, and all her interest therein, to her two daughters; they paying yearly to her son 25*l*. by quarterly payments, *viz.* each of them 12*l*. 10*s*. yearly out of the rents of the premises, during his life, if the term so long continued; and this was clearly held a tenancy in common by Lord C. Jeffries, the 25*l*. being to be paid by the two daughters equally in moieties.

A similar construction has been put upon a bequest to and amongst three persons, (*i*) or between them, (*k*) or to them in equal shares and proportions, (*l*) or to be distributed to them in joint and equal proportions. (*m*)

Where there is an express limitation to the survivors, or survivor.

Nor will a different construction prevail where a testator after such distributive words superadds an express limitation to the survivors or survivor, or directs that the estate may be enjoyed with benefit of survivorship.

It has indeed been formerly laid down in positive terms that where lands are devised to two or more persons to hold to them and the survivor of them, they must take the estate in jointenancy, though there may be other words in the will indicating a tenancy in common. (*n*) And Lord Hale has said that a devise to two equally to be divided between them, and to the survivor of them, makes an estate in jointenancy upon the express import of the last words. (*o*) But a contrary doctrine has prevailed in later cases, in which the Courts have been ingenious to give effect to the words of severance without sacrificing the words of the survivorship.

(*h*) Marryatt *v.* Townley, 1 Ves. 102.

(*i*) Campbell *v.* Campbell, 4 Bro. C. C. 17. And see Ackerman *v.* Burrows, 3 Ves. and B. 54.

(*k*) Lashbrook *v.* Cock, 2 Meriv. 70.

(*l*) Jones *v.* Randall, 1 Jac. and Walk. 100.

(*m*) Ettricke *v.* Ettricke, Ambl. 656.

(*n*) Furze *v.* Weekes, 2 Rol. Abr. 90.

(*o*) 1 V. ent. 216.

Thus in the case of Lord Bindon *v.* the Earl of Suffolk, where there was a devise to five grand-children, share and share alike, equally to be divided between them, and if any of them should die, then *to the survivor;* the devisees were held to take as tenants in common; for, said Lord Cowper, C. by the words "if any of them die, his share shall go to the survivor," it must be intended, that if any should die in the lifetime of the testator; for by that construction every word of the will would have its effect and operation. (*p*)

And in the case of Rose d. Vere *v.* Mills, where the devise was to the testator's five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as jointenants, Lord Mansfield and the Court of King's Bench considered the devise as creating a tenancy in common in fee, and that the words *survivors and survivor* related to the death of the testator. (*q*)

So where one devised to his two sons and their heirs and the longer liver of them, equally to be divided between them and their heirs, after the death of his wife, the Court was of opinion that the sons took as tenants in common, and that the devise was good; according to the rule of giving effect to the intention in the construction of wills, the intent of the testator appearing to be not only to provide for his two sons, but for their posterity; and that not only his sons but their heirs should have an equal part; for the lands were "equally to be divided between them and their heirs." And though by the first words it was given to them and the survivor of them, yet the last words explained what was intended by the word *survivor, viz.* that the survivor should have an equal division with the heirs of him who should die first. And though the testator had not aptly expressed himself; yet, upon all the words taken together his

(*p*) 1 P. Wms. 96. (*q*) 3 Burr. 1881.

meaning seemed to be agreeable to the said construction. (*r*)

Robert Clarke devised his estate to trustees, and their heirs, to the use of the testator's niece S. C., and his two nieces E. G. and A. C. and the survivor and survivors of them, and the heirs of the body of such survivor and survivors; as tenants in common, and not as joint-tenants; and for want of such issue remainder over. Upon a case sent by the Master of the Rolls for the opinion of the Court of C. P., the Judges of that Court certified that the devisees took as tenants in common. (*s*)

In the case of Russell *v.* Long (*t*) it was said by the Master of the Rolls, "whenever there are words plainly importing a tenancy in common, such construction must be put on other inconsistent words, as shall, if possible, relate to some time or other, and not such as would defeat or destroy the effect of the words importing a tenancy in common. And on the same principle in Hawes *v.* Hawes (*u*) to give effect to all the words of the will, survivorship was confined to the age of twenty-one, in reference to a prior clause in the same will, confining the survivorship to that age with respect to a different subject.

Where a bequest was limited over on certain events to A., B., and C., in equal proportions, share and share alike, his, her, or their issue, or the issue of either of them, to take their parents' share, with benefit of survivorship to the testator's said nephews and niece," the survivorship was confined to the death of the testator. (*x*)

But, independently of all inference to be drawn from the contents of the will, it is well settled that a devise

But a simple devise or bequest to two

(*r*) Blisset *v.* Cranwell, Salk. 226.

(*s*) Garland *v.* Thomas, 1 N. R. 82.

(*t*) 4 Ves. J. 554.

(*u*) 3 Atk. 523. and see King *v.* Taylor, 5 Ves. J. 810. Daniell *v.* Daniell, 6 Ves. J. 300. Shergood *v.* Boone, 13 Ves. J. 375.

(*x*) Maberly *v.* Strode, 3 Ves. J. 455.

or more, generally, makes a joint-tenancy.

to two or more generally, or two or more and their heirs, makes them joint-tenants.

And this rule of construction is applicable as well to personal as to real estate; in which instance our Courts of Equity follow the common law, and not the civil law, where survivorship is not admitted in legacies (*y*)

A. bequeathed four parts of his residuary estate to B. and the children born of her body. B. had no child at the time the will was made, but had one child born afterwards; and then B. died in the lifetime of the testator: it was held that by this bequest a joint-tenancy was created, and that the child took the whole by survivorship. (*z*)

And in some cases the construction of words in a will, as importing a joint-tenancy, has been favoured as tending to effectuate and preserve the estates. As where a testator devised to Jane and Elizabeth all his estate, to be equally divided between them during their natural lives, and after the deceases of the said Jane and Elizabeth, to the right heirs of Jane for ever; the only question was, whether this devise made Jane and Elizabeth joint-tenants for life, so as that, upon the death of Jane, the whole survived to Elizabeth for life; or whether, upon the words "equally to be divided between them," they were tenants in common? (*a*)

Lord Chief Justice Holt pronounced the opinion of the Court that they were joint-tenants, notwithstanding the words "equally to be divided among them," and that the lands ought to survive to Elizabeth.—1st, Because, though upon such words, generally, they would be tenants in common: yet if it should be so in this case, it would be expressly against the intent of the testator, and would defeat the heirs of Jane of part; for they were to take altogether, and not by moieties, one at one time, and one at another, but all at once. If they should

(*y*) See Cray *v.* Willis, 2 P. Wms. 539.

(*z*) Buffar *v.* Bradford, 2 Atk. 220.

(*a*) Tuckerman *v.* Jeffries, 3 Bac. Abr. 681. Holt, 370.

be tenants in common, they must take by moieties at several times. 2dly, It was expressed that the heirs of Jane were not to take till after both their deceases. 3rdly, If they should be tenants in common, then the heirs of Jane would be in danger to lose a moiety; for as to that one moiety, it must be a contingent remainder; so that if Elizabeth had died during the life of Jane, the contingency for that moiety not happening [*when the particular estate determined,*] it must descend to the heirs at law of the testator, who were Elizabeth and the issue of Jane, as coparceners. 4thly, Jane and Elizabeth were heirs at law of the testator; and, as such, the whole would have descended to them in coparcenary, if no will had been made: but it was plain, the testator intended to prefer the heirs of Jane to the whole; it was therefore adjudged that Elizabeth and Jane took as joint-tenants.

Where J. S. devised lands to A. and B. and the *survivor of* them, and their heirs and assigns for ever, equally to be divided between them, share and share alike; and A. died in the testator's life-time; and then the testator died, leaving C. his heir at law; the Court said that wills must be so expounded that, if possible, every word might have its effect. That, in that case the devise being to two and the *survivor of them,* they were plainly joint-tenants for life; and that the next words "and to their heirs equally to be divided between them, share and share alike," as plainly imported them to be tenants in common of the inheritance, by which construction every word of the will took effect. But A. having died in the testator's life-time, B. became thereby entitled to the whole for his life; and the inheritance of A. having lapsed by his death, his moiety must descend to C. as the testator's heir at law. (*b*)

If two different dispositions of the same estate occur

(*b*) Barker *v.* Giles, 2 P. Wms. 280.

Of the effect of two different dispositions of the same estate in a will.

in the same will, the better opinion seems to be that the two devisees shall take in moieties; though Lord Coke was of opinion that the latter words revoked the former. (c) In many of the old books it is said generally, that there should be a joint-tenancy: (d) but Mr. Hargrave observes, that according to the modern opinions, and, as it seems, the best, there will be a joint-tenancy, or tenancy in common according to the words used in limiting the two estates; by which is meant that if the two estates given by the will have the unity or sameness of interest, essential to a joint-tenancy, the devisees shall be joint-tenants; but, if otherwise, they shall be tenants in common.

And if the words used are contrariant, the Court rejects those which, from the nature of the subject, or bearing of the context, appear to be least consistent with the intention of the testator. As where a bequest was to A. and B., of a sum of money, jointly and between them; the Court, reasoning from the nature of the subject, gave the preference to the words importing a severance. (e)

Where no expressions occur to favour a tenancy in common, courts will not build the construction on conjectural grounds: nor will the subject matter supply an argument one way or the other.

Upon the whole it appears, that the inclination of the Courts against the construction of joint-tenancies disposes them to give effect to the slightest expressions indicating the intention to benefit the devisees equally; yet that where no such expressions occur, the Courts will not, on conjectural grounds, make a construction which has no foundation in the will itself to support it. (f) Nor will the subject matter of the devise or legacy supply any argument one way or the other. And in the case of a mere money legacy, the rule is the same. Thus the present Lord Chancellor, in a late case, (k)

(c) Co. Litt. 112. 6. n. 1. 2 Atk. 373. 3 Atk. 493.

(d) Plowd. 539.

(e) Perkins v. Baynton, 1 Bro. C. C. 118.

(f) Shore v. Billingley, 1 Vern. 482. Whitmore v. Trelawney, 6 Ves. J. 129. Jackson v. Jackson, 9 Ves. J. 597.

stated that upon the doubt which Lord Thurlow had expressed in Perkins *v.* Baynton, (*i*) whether there could be a joint-tenancy of a mere money legacy or a residue, and the cases cited upon the distinctions attempted upon the question, where the residuary legatees were executors, he had looked at one of the original wills in Doctors' Commons, where a construction had been put upon these bequests; and he had made up his mind upon the point, upon which he had never any doubt since, that a simple bequest of a legacy or a residue of personal property to A. and B., without more, is a joint-tenancy.

And so in another case, (*k*) where a testator gave the residue of his real and personal estate to trustees, to sell and apply the interest, proceeds, and profits thereof, from time to time, to the use of his grand-children, A., B., C., and D. equally between them, share and share alike, for their several natural lives; and from and after the decease of the survivors of them, in trust to pay and apply the principal money to and among all and every the children of his said grand-daughters, equally to be divided between them share and share alike; upon the death of two of the grand-daughters leaving children, the question was what should become of the interest which the two deceased grand-daughters took, until the death of the survivor, the same being claimed by the children of the deceased grand-daughters on the ground that their mothers were tenants in common; but the Lord Chancellor said, that though the words "equally to be divided," and "share and share alike," were, in general, construed in a will to create a tenancy in common; yet, where the context shewed a joint-tenancy to be intended, the words should be construed accordingly; and that, in the case before him, it was evident that the interest was to

(*h*) Crooke *v.* De Vandez, 9. Ves. J. 197.

(*i*) 1 Bro. C. C. 118.

(*k*) Armstrong *v.* Eldridge, 3 Bro. C. C. 215., and see Whitmore *v.* Trelawney, 6 Ves. J. 130.

be divided among four, while four were alive; among three while three were alive; and that nothing was to go to the children, while any one of their mothers was living; and declared the whole interest to belong to the two living grand-daughters by survivorship.

A provision for the survivorship of the shares among tenants in common, will not extend, without express words to the accruing shares.

When, as is usual in provisions for families, a sum of money has been given to be divided among several persons as tenants in common, with a direction that if any one of them should die before twenty-one, or marriage, his share should survive to the others, the share of the person first dying will survive to the others; but if a second die, only the original share of such second person so dying will survive, and not the share which he took by survivorship, which being a new legacy, was not reached by the words directing the survivorship of the shares.

This doctrine seems to rest upon better ground when the bequest to the survivors is expressly to them in terms importing a tenancy in common; as where the bequest to the survivors was to them "share and share alike," in which case Sir Joseph Jekyll, M. R. held that the accruing share being *several*, must go to the administrator. (*k*)

But in the case of Barnes *v.* Ballard, (*l*) where the bequest over was simply to the survivors, the share which accrued by survivorship was held by Lord King, C. not to survive again. So where a sum of money was left to each of three persons A., B., and C., the interest to be added to the principal yearly until they should respectively attain the age of twenty-one years; and in case any of them should die before that age, then to the survivors; and A. first, and then B. died, both under the age of twenty-one; Lord Thurlow, sitting in bankruptcy, decided that only the original share of B. survived to C. But as his Lordship allowed the parties to file a bill, advantage was taken of the permission; and

(*k*) Rudge *v.* Barker, Ca. temp Talb. 124., and see Vandergucht *v.* Blake, 2 Ves. 534.

(*l*) Stated in Pain *v.* Benson, 3 Atk. 79.

the cause was heard before Lord Kenyon, M. R. who decided the same way. (*m*)

It seems, however, that accruing shares will survive, without an express provision for that purpose, if the fund be made an aggregate fund, and limited over after certain legatees first named, who must all be dead before the ulterior limitations can take effect. (*n*)

(*m*) *Ex parte* West, 1 Bro. C. C. 575.; and see Perkins *v.* Michlethwaite, 1 P. Wms. 274. and Bargrave *v.* Whitwicke, Finch. 436.

(*n*) Worledge *v.* Churchill, 3 Bro. C.C. 466. Pain *v.* Benson, 3 Atk. 78.

CHAP. III.

PRESUMPTIONS AND PAROL EVIDENCE.

SECT. I.

Satisfaction of Legacies and Portions.

THE rule prevailing in courts both of law and *equity*, that external evidence may be received to REBUT PRESUMPTIONS, submits the operation of written instruments, more extensively than any principle hitherto noticed, to the controul of extrinsic circumstances. In Courts of Equity, more especially, this allowance has prevailed. The genius of the common law inclines it to generality and certainty; and even its presumptions are, in some cases, too inflexible to be disapproved. But equity, as its rules are framed more for particular than general relief, allows all its presumptions to be repelled by opposite testimony, and by testimony of every kind.

Of the presumption against double portions.

Thus it is a settled rule of presumption in equity, (borrowed from the civil law) that if a father gives a legacy to a child, and afterwards advances the like sum to the same child, such advancement operates as an ademption of the legacy. This presumption was opposed in Ellison *v.* Cookson (*a*), by extrinsic evidence, consisting of declarations and correspondence, which were admitted on the above doctrine of receiving parol evidence against presumptions; though as, in the opinion of the Court, the evidence when received did

(*a*) 1 Vez. Jun. 100.

not, with sufficient clearness, demonstrate any intention of the testator opposed to the presumption, the presumption prevailed. In Debeze *v.* Mann (*b*), (which, indeed, was the case of a father and putative child, but the legacy being *expressed* to be for a portion it came came up to the principle upon which the presumption is founded in the case of a general legacy by a lawful parent) (1) the presumption was repelled by parol evidence of words used in conversation, clearly importing a design to better the child beyond the extent of the advancement.

Legacy from a parent to his child, presumed to be for a portion.

The doctrine of the Court of Chancery seems to be this; that where a parent gives a legacy to a child, *without stating any purpose for which it was given,* it is, nevertheless, to be understood as a portion; and therefore on the principle of leaning against double portions if the father afterwards advances a portion on the marriage (*c*) or after the marriage of that child (*d*), it is an ademption of the legacy by a constructive satisfaction of it in the whole or in part.

Otherwise, if by a stranger.

But if a stranger gives a legacy to a child, *not describing it as a portion,* and afterwards makes such advancement by way of marriage portion, such subsequent advancement will not be construed an ademption or satisfaction of the legacy. (*e*) To produce this consequence in the case of a stranger, either the legacy must be described as a portion, or the advancement must be expressly stated, or distinctly appear, to have been made for the purpose of satisfying the legacy. In such a case, although the advancement is expressly

(*b*) 2 Br. C. R. 165.

(*c*) Rawlins *v.* Powell, 1 P. Wms. 299. Dwyer *v.* Lysaght, 1 Ball. and B. 167. Bell *v.* Coleman, 5 Madd. 24.

(*d*) Powell *v.* Cleaver, 2 Bro. C. C. 499, and see *ex parte* Dubost, 18 Ves. J. 153.

(*e*) Debeze *v.* Mason, 2 Bro. C. C. 520.

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(1) The cases of a natural child, see Grave *v.* Lord Salisbury, 1 Bro. C. R. 425, and of uncle and niece, see Shudall *v.* Jekyll, 2 Atk. 516., are said to be out of the rule.

made by way of marriage portion; still, if the legacy is not expressly given for the same purpose, such advancement will not operate as an ademption.

And a putative father is considered as a stranger to his illegitimate child.

It follows, therefore, that as the law does not recognize the relation of the putative father and illegitimate child, the father stands as a stranger; (*f*) and thus the case of an illegitimate child has, in this respect, an advantage over one legitimately born; since, if a legacy be given to him by his putative father, such legacy will not be covered by any subsequent advancement, unless it appears, positively, that such advancement was intended to be a satisfaction of the legacy. Whereas a legacy from a father is understood as a *portion*, though not so described: what he gives thus to his child is presumed to be meant by way of provision, as paying a debt of love and natural affection; if, therefore, he afterwards advances him by a provision in his lifetime, such provision is considered as given in the same spirit and feeling, and as paying the same debt of nature which he had intended to discharge by his will. But in the case of a stranger, equity considers that what he gives by his will he gives as a mere bounty; and that what he afterwards advances, he gives as an addition to his first bounty. Nor if a sum be raised by an executor, under a power by way of advancement for a child, is it any satisfaction of a legacy given by the person exercising the power. (*g*)

Where these double gifts take place between parent and child, the presumption of satisfaction will arise notwithstanding slight circumstances of difference between the advancement and the portion. (*h*) But where the case is not between parent and child, the Court will readily allow the presumed satisfaction to be repelled by circumstances. (*i*)

(*f*) Debeze *v.* Mason, *supra.* Powell *v.* Weaver, *supra.* Smith *v.* Strong 4 Bro. C. C. 494.

(*g*) Seed *v.* Bradford, 1 Ves. 501.

(*h*) Pye ex parte, Dubost ex parte, 18 Ves. J. 140.

(*i*) Hinchcliffe *v.* Hinchcliffe, 3 Ves. J. 529. Carr *v.* Eastabrooke, 3 Ves. J. 564.

Where, indeed, a testator standing or acting *in loco parentis,* after giving a legacy to the object of his care, makes a provision in his lifetime for the legatee, such advancement will be presumed to be in satisfaction. At least parol evidence will be easily let in to shew that the legacy was intended as a provision or portion. (*k*)

A brother may very naturally stand *in loco parentis* : (*l*) but an uncle or grandfather are not considered in this light, as a mere consequence of the nearness of their relationship. (*m*)

An advancement to a child on marriage does not deprive him or her of the benefit of the residue bequeathed by a will, previously made, on account of the uncertainty of the residue ; (*n*) the rule being, that the gift must be as advantageous as the legacy, to operate as a satisfaction ; and, accordingly, money secured to be paid on a contingency, is no satisfaction of a legacy absolutely given. (*o*) And an advancement must be for the same purpose ; (*p*) and similar in kind. (*q*) Thus, a bequest of money is not satisfied by the gift of an annuity ; (*r*) nor of a beneficial lease ; (*s*) nor by a legatee's being taken into partnership by the testator. (*t*) And parol evidence is admissible to qualify the effect of the advancement : as in a case, where a testator having made an advancement to his wife of the same amount as a legacy previously bequeathed to her, declared, at the time of his advancement, that he had not done enough for his wife ! (*u*)

(*k*) 7 Vez. J. 508, and Monck *v.* Lord Monck, 1 Ball. and B. 298.
(*l*) Monck *v.* Lord Monck, 1 Ball and B. 298.
(*m*) Roome *v.* Roome, 3 Atk. 183. Brown *v.* Peck, 1 Ed. 140.
(*n*) Freemantle *v.* Bankes, 5 Ves. J. 85.
(*o*) Clarke *v.* Sewell, 3 Atk. 98.
(*p*) Roome *v.* Roome, 3 Atk. 183. Bell *v.* Coleman 5 Madd. 24.
(*q*) Compton *v.* Sale, 2 P. Wms. 555. (*r*) See the last case.
(*s*) Grave *v.* Salisbury, 1 Bro. C. C. 425.
(*t*) Holmes *v.* Holmes, 1 Bro. C. C. 555, Append.
(*u*) Miller *v.* Miller, 3 P. Wms. 356.

As an advancement made by a testator, after the date of his will, may satisfy his legacy; so a gift by will, if equally advantageous, may be a satisfaction in the whole, or in part, of portions due to children in virtue of the previous marriage settlement of the testator. And in one case settled portions were held to be satisfied by legacies of greater amount, though made payable three months after the portions were to have been paid according to the settlement. (*x*) But a general residuary devise and bequest to a wife for life was adjudged to be no satisfaction of a life estate, settled upon her by her marriage settlement; the residue being only that which remains after all payments, and therefore uncertain in amount. (*y*)

SECT. II.

Debts paid by Legacies.

A legacy by a debtor to his creditor, greater than, or equal to, the debt, presumed a satisfaction.

It is also a rule of presumption established in Courts of Equity, that where a legacy is given by a debtor to his creditor, exceeding, or equal to, the amount of the debt, it is a satisfaction of the debt. But this rule of presumption, though established, is met by another, *viz.* that every bequest is *prima facie* a benevolence (1); on which ground the Courts have, of late, viewed it with great jealousy; and have shewn a very

(*x*) Sparks *v.* Cater, 3 Ves. J. 535.

(*y*) Foresight *v.* Grant, 1 Ves. J. 298; and see Garthshore *v.* Chalie, 10 Ves. J. 1.

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(1) See the remark of Lord Chancellor Talbot in Fowler *v.* Fowler, 2 P. Wms. 353. and of Lord Hardwicke in Richardson *v.* Greese, 3 Atk. 68., who there says, that the maxim of *debitor non præsumitur donare* would not hold, if it were to be reconsidered. And again, that "legacies naturally imply a bounty." And observe what was remarked by Lord King, in reversing the decree of the Master of the Rolls, in Chauncey's case, 1 P. Wms. 410. Lord Alvanley also called it a very absurd rule, 3 Ves. 466.

ready disposition to take cases out of it, wherever any thing could be collected from the will, indicative of a contrary intention in the testator. A legacy is no satisfaction of a debt, unless it proceeds from the same person from whom the debt is due. (*a*) And it must be general, and not given for a special purpose. (*b*) It must be certain, and not contingent. (*c*) It must be *ejusdem generis* with the debt; (*d*) equal or greater in amount, not later in taking place, and co-extensive in duration. (*e*) And, furthermore, to be a satisfaction, it must be such at the testator's death. (*f*)

Where not a satisfaction.

Where a legacy is to a servant, it will not go in satisfaction of his wages; (*g*) and legacies are no satisfaction of debts contracted subsequently to the date of the will; (*h*) neither can a legacy be a satisfaction of a negotiable bill, for the same being a transferable instrument, the testator cannot know who will be the creditor, in virtue thereof. (*i*) And, upon a similar principle, it should seem that it will not operate as a satisfaction of a running account, the result of which is in its nature uncertain.

But notwithstanding the strong disposition of the Court to bound the application of this rule of presumption, parol evidence has been refused by great chancellors to be admitted to take a case out of its operation. Thus in Fowler *v.* Fowler, (*k*) Lord Talbot, after having, at the same time, declared his disapprobation of the maxim, and his apprehension of the danger of attempting to alter it, observed that, though in some

(*a*) Compton *v.* Sale, 2 P. Wms. 555.

(*b*) Chauncey's case, 1 P. Wms. 408.

(*c*) Spinks *v.* Robins, 2 Atk. 491.

(*d*) Broughton *v.* Evrington, 7 Bro. P.C. 12. Eastwood *v.* Vinke, 2 P. Wms. 617. Sir Geo. Chidley *v.* Lee, Prec. in Ch. 228.

(*e*) Mathews *v.* Mathews, 2 Ves. 635.

(*f*) Chaplin *v.* Chaplin, 3 P. Wms. 248.

(*g*) Richardson *v.* Greese, 3 Atk. 68.

(*h*) Thomas *v.* Bennett, 2 P. Wms. 341. Fowler *v.* Fowler, 3 P. Wms. 354.

(*i*) Carr *v.* Eastabrooke, 2 Ves. J. 564.

(*k*) 3 P. Wms. 353.

cases (2) parol evidence had been allowed in order to shew that the testator designed to give the legacy, exclusive of the debt; yet his opinion was against admitting such evidence, for then the witnesses and not the testator would make the will. And in Richardson *v.* Greese, (*k*) Lord Hardwicke, after remarking that the Court had always shewn itself dissatisfied with the rule, and had been fond of distinguishing cases out of it, observed that these distinctions were not to be taken from particular circumstances *dehors* the will, but must be found in the will itself.

Of the distinction between presumptions, and positive rules of construction.

Whether the rule is a rule merely of presumption or of settled and fixed construction, seems to be the true question upon which these decisions turn; for where a positive rule of construction is established by the maxims or practice of the Court, the instrument to which such positive rule of construction applies becomes incapable of any other sense or operation; so that to oppose such construction, is to contradict the instrument itself.

If, therefore, this presumption of a legacy's being a satisfaction of a debt could be shewn to be established upon a technical and positive rule of *construction*, a sufficient reason would appear for the rejection by the Courts of all extrinsic evidence to oppose its operation, however readily such an odious rule might be made to give way to inferences, arising out of the context and apparent design of the instrument itself.

In the case of double portions, when the testator subsequently advances the legatee, the *presumption* is not connected with any rule of *construction*, since the will is in that case not affected by construction, but, *pro tanto, revoked* by a presumption arising entirely out of an act of the testator posterior to the will: but where

(*k*) 3 Atk. 60.

(2) This had been positively so adjudged, thirty years before, in Cuthbert *v.* Peacock, 2 Vern. 593.

a legacy is presumed a satisfaction, the will has an *operation* and *construction*; though, by being made to act upon a sum already due to the legatee, the benefit *primâ facie* intended, is lost.

SECT. III.

Double Legacies.

Double legacies by the same instrument.

Where the same thing has been given to different persons by the *same* instrument, the decisions have appeared to turn *wholly* upon construction. And though the rule of construction is differently stated by very high authorities, some considering the last bequest as revoking the first, others regarding both as co-operating to effect a joint-tenancy; and others again regarding them as rendering each other void for uncertainty; yet whichever of these opinions be right, it seems doubtful whether parol evidence can be let in to determine the operation. Where there are two legacies to the same person by *different* instruments, the rule of construing the bequests accumulative seems to rest upon a slight foundation, (*l*) and to be easily repelled by *internal* evidence. But it is still a matter of enquiry, how far extrinsic evidence can be received for this purpose. (*m*)

By different instruments.

In Barclay *v.* Wainwright, (*n*) his Honour referred it to the Master to enquire, whether the several persons, legatees by the first codicil, to whom *no* legacies were given by the second, were dead, or not, in the service of the testator at the date of the second codicil; and such facts were received for the sake of assisting and

(*l*) James *v.* Semmens, 2 H. Bl. 213.
(*m*) See Cliffe *v.* Gibbons, 2 Lord Raym. 1324.
(*n*) 3 Ves. J. 462.

elucidating the internal evidence, by shewing that the omission of certain legatees named in the will did not spring from any new intention of the testator.

The same Judge, in a case of double legacies, which afterwards came before him, (*n*) upon the question, whether the parol evidence could be admitted, observed, that, "if it is an established rule that two legacies are accumulative, where they are given by different *instruments*, he could not raise a presumption by evidence against it; and he was inclined to think it must be taken to be a rule." The rule was also laid down in Ridges *v.* Morrison, (*o*) by Lord Chancellor Thurlow—"that where a testator gives a legacy by a codicil as well as by his will, whether it be *more, less,* or *equal,* to the same person who is legatee in the will, it is an accumulation." (*p*) The same chancellor adds, that it is incumbent upon the executor to produce evidence to the contrary, if he contest such accumulation. But the *species* of evidence to which his Lordship afterwards adverted was wholly internal, and arising out of the context of the instruments. The rule, as laid down in the case just alluded to, was adopted from Hooley *v.* Hatton, (see the note at the end of the case of Ridges *v.* Morrison,) which case of Hooley *v.* Hatton, Lord Thurlow observed, was examined with abundant care; and he accompanied that observation with a remark, that it was unnecessary to repeat the cases after reading the very able opinion of Mr. J. Aston, which, he said, contained the whole doctrine of the law upon the subject.

State of the doctrine as to the presumption of the courts in the cases of double legacies, in the same, and in distinct instruments.

The state of the presumption, according to the varying circumstances of the case, seems to be settled by the result of the authorities upon the following criteria, viz. where the same *specific thing or corpus* (as a diamond ring, where the testator has but one,) is twice given to the same person, either by the same

(*n*) Osborne *v.* Duke of Leeds, 5 Ves. J. 269.
(*o*) 1 Bro. C. C. 389.
(*p*) See Att. Gen. *v.* Harley, 4 Madd. R. 267.

instrument, or by different instruments, there, in the nature of the thing, it is but a repetition. Where the same *quantity*, as 100*l.* is twice given by the *same* instrument, to the same person, the presumption *simpliciter* is against the legatee: (*a*)—but where a second legacy of a different amount is given to the same person, by the same will, and no cause assigned, (*b*) or where the same *quantity* is given by the same instrument to the same person, and with a different or additional cause assigned for it, or with any material circumstance of variation accompanying the second gift; or where one is absolute and the other contingent; or where one is a gross sum, and the other is an annuity; the presumption is turned against the executor, in favour of the accumulation. (*c*) Where equal sums are given in two *distinct* writings, or a larger after a less, or a less after a larger, the latter gift is construed an accumulation; which is the rule, also, of the civil law. (*d*)

But though the presumption in a case, wherein two legacies to the same person, of the same sum or quantity, occur in distinct instruments, leans against the executor, yet it is only a presumption *simpliciter*, and is turned the other way where the same cause is *expressly* assigned in both instruments for the gift without any additional reason; (*e*) or, the second instrument affords evidence, that it was intended by the testator in substitution for the first instrument. (*f*)

(*a*) Goodinge *v.* Goodinge, 1 Ves. 231. Murray *v.* Jones, 3 Ves. and B. 313, or in a will and codicil incorporated by reference, see Duke of St. Albans *v.* Beauclerk, 2 Atk. 636.

(*b*) Curry *v.* Pile, 2 Bro. C. C. 225.

(*c*) Masters *v.* Masters, 1 P. Wms, 421. Hodges *v.* Peacock, 3 Ves. J. 735. Hurst *v.* Beach, 5 Madd. 351. Holford *v.* Wood, 4 Ves. J. 79.

(*d*) Dig. Lit. 22. tit. 3, leg. 12. See also Dig. Lit. 30. tit. 1, leg. 34.

(*e*) Menochius De Presumptionibus, lib. præs. 128, num. 4, 13, 14, and see Swinb. part 7. c. 20, fol. edit. 550. See also Osborn *v.* Duke of Leeds, 5 Ves. J. 369. Duke of St. Albans *v.* Beauclerk, 2 Atk. 636. Curry *v.* Pile, 2 Bro. C. C. 225. Atty. Gen. *v.* Harley, 4 Madd. 267. Hurst *v.* Beach, 5 Madd. 351.

(*f*) Campbell *v.* Earl of Radnor, 1 Bro. C. C. 271. Coote *v.* Boyd, 2 Bro. C. C. 521.

And it seems also, according to Lord Hardwicke, (g) that where in a distinct instrument a *larger* legacy is given to the same person, assigning *in totidem verbis*, and with a perfect identity, the same cause which was expressed in the former instrument, this shall not be a double legacy; with which position Aston, J. in Hooley *v.* Hatton, appears to agree. And the same doctrine seems to be held by Lord Thurlow, in Ridges *v. Morrison* above cited; and is stated to be the rule by *Menochius*.(h)

Whether parol evidence is admissible to determine this question?

It is to be remarked, that in the above-mentioned case of Hooley *v.* Hatton, which is a very leading authority, no idea appears to have been entertained of the admissibility of parol evidence. Mr. J. Aston opened with observing that, as in the case before him, there was no *internal* evidence; therefore, he must refer to the general rule of law. And the Lord C. B. Smythe observed, "the intention is the clearest rule: but it is admitted on all hands, here is no *internal* evidence; we must, therefore, refer to the rule of law." And, lastly, by the Lord Chancellor Bathurst, it was said that "no argument could be drawn in the case before him from internal evidence; they must, therefore, refer to the rule of law."

What Lord Thurlow's opinion was, as to the admissibility of parol evidence, does not expressly appear in the above-mentioned case of Ridges *v.* Morrison: but it is to be observed, that in illustrating his remark, "that slight circumstances may operate in proof of the testator's intention," he specified such only as could be collected from the context of the instruments. And in Campbell *v.* the Earl of Radnor, (i) the decision turned upon the words of the instruments. But in Coote *v.* Boyd, (j) the point respecting parol evidence came directly under adjudication, in which Lord Thurlow laid down the rule thus:—"the question, whether by

(g) Duke of St. Albans *v.* Beauclerk, 2 Atk. 640.

(h) Lib. 4 præs. 128, and see Swinb. 4to edit. 201. See also Benyon *v.* Benyon, 17 Ves. 34.

(i) 1 Bro. C. R. 271. (j) 2 Bro. C. R. 521.

giving two legacies the testator did not intend the legatee to take both, is a question of presumption *donec probetur in contrarium,* and will let in *all sorts* of evidence." And the same Chancellor further observed, (what the temper of later decisions seems inclined to adopt as the true and practicable distinction) that "*where the question arises upon the construction of words simply,* qua *words, no evidence (i. e. extrinsic evidence) can be admitted.*"

Whether his Lordship would have been ultimately governed by these maxims, if the decision of the case had depended upon their application, cannot be known, since the case was determined upon the *internal* evidence of the will and codicil themselves. It was much contended that it was a case of presumption, and that *all* presumptions were open to be encountered by parol evidence.

SECT. IV.

Ambiguities.

THE instance most frequently chosen as the example of the *ambiguitas latens* is that of a devise to a person of the same name with another, without any specific description appearing upon the face of the will, to designate the real object of the testator's bounty. (*k*) The case put by Lord Hobart, was that of a devise by a testator to his son John, having two sons of that name; and the same Judge having a little above decisively declared, that a testator's intent must be expressed in a will written, that it may be certain to the Court, observed on the case just put, that an averment might make this, *i. e.* who was designed by the testator, certain. The case and the comment contain together a true description of the *ambiguitas latens,* to constitute

(*k*) See 5 Rep. 68. Lord Cheyney's case. Hob. 32. Counden *v.* Clark, 3d point, and 1 Salk. 7. Lepcot *v.* Brown.

which there ought to be a positiveness and certainty of verbal expression, becoming ambiguous in sense by the discovery of a matter not appearing in the instrument. This is the ambiguity latent, which, as it is created by facts, so it is removeable by a further investigation of facts.

A husband devised to his wife 700*l.* East India Stock, having no East India Stock; but he had 700*l.* Bank Stock: and the words were held to carry the Bank Stock, it being only an error in description. (*l*) Lord Hardwicke said it was only *error demonstrationis*; and was no more than the devise of a black, where the testator had only a white horse. Thus, also, where A. devised to J. S. those his lands in B., in the county of S. in the possession of D. A. had no lands in that county: but had lands in B., in the county of H., in the possession of D. It was held that the lands in the county of H. passed by this devise. (*m*) Upon the same principle it has been held that where one devised all his freehold houses in A., having none there but leasehold, the leasehold should pass. (*n*) But though a testator may have mistaken his property, it does not follow that a disposition, made under such mistaken impression, shall not have its literal effect. Thus, where a testatrix, reciting that she was possessed of 12,700*l.* 3 per cent. consolidated Bank Annuities standing in her name, gave and bequeathed the same, or so much of such Bank Annuities as should be standing in her name at her death, and at the date of her will; and at her death she had near 15,000*l.* in that fund; only the 12,700*l.* was held to pass, the recital being considered as involving the reason of the disposition. (*o*)

Of mistakes in the names of persons.

The names of persons appointed to take, under wills, (*p*) have been set right by parol evidence, where

(*l*) 1 Ves. 255, Door *v.* Geary. (*m*) 1 Ld. Raym. 728.

(*n*) 1 P. Wms. 286. Addis *v.* Clement, 2 P. Wms. 456. 2 Atk. 451. Cro. Car. 493.

(*o*) 15 Ves. J. 319. Hotham *v.* Sutton.

(*p*) And see Hodgson and Caldecot *v.* Fitch and Another, 2 Vern. 593.

both the Christian and surname have been mistaken. In such case no words are *supplied* or *substituted*, but the mistaken appellation in the instrument is applied to the person really intended by it; and the names of persons having no intrinsic meaning, the will is rectified without any alteration of the sense.

Name mistaken, where the name used happens to belong to a person in being, and who might be in the testator's contemplation.

There may be a distinction, indeed, between such mistaken use of a name, which, though a wrong appellation of the object of the testator's bounty, happens to belong to an existing person within the testator's knowledge and possible contemplation, and that of a name under which there is nobody (*q*) to claim, as coming within its literal description. Thus, in Beaumont *v.* Fell, (*r*) where the point arose upon a bequest in a will to Catherine Earnley, and the name of the person who claimed the legacy as the real object intended to be benefited was Gertrude Yardley, it was first shewn by her, and admitted, that no person called Catherine Earnley claimed the legacy; and then evidence was offered to shew that the scrivener, who took instructions for drawing the will, had made the mistake. The Court established the claim of Gertrude Yardley: but not without observing how very material it was to the case that no such person as Catherine Earnley claimed the legacy (1).

On the other hand, the Court of King's Bench treated the case of Doe on the demise of Hayter *v.* Joinville, (*s*) as affording an instance of an incurable ambiguity. A

(*q*) Rivers' case, 1 Atk. 410.

(*r*) 2 P. Wms. 141, and see Edge *v.* Salisbury, Ambl. 71. Gines *v.* Kemsley, 1 Freem. 293; Del Mare *v.* Rebello, 3 Bro. C. C. 246; Eade *v.* Eade, 5 Madd. 119.

(*s*) 3 East Rep. 172.

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(1) In the case of Del Mare *v.* Rebello, 3 Bro. C. R. 246. the devise was to the children of the testator's sisters, Estrella and Reyna. Estrella had children; Reyna had none, and had changed her name and become a nun professed. But the testator had a third sister, Rebecca, who had children. The Chancellor would not substitute the name of Rebecca for Reyna.

testator having devised to his wife's *family* one moiety of his residuary property, and to his brother's and sister's *family* the other moiety, died, leaving a brother and sister living, and both with a numerous issue, as well as the children of a deceased sister. It was judged impossible to construe the will with any rational certainty, so as to make a precise application of the word *family*. And this was a proper example of the ambiguity patent, as the uncertainty was considered as inherent in the term itself; which, though the context of the will might have defined its applicability, could not receive explanation from any extrinsic circumstances. Again, where a testator devises to 'one of the sons of J. S. (*t*) who has many sons, no regard can be paid to any thing extraneous to the will, as the medium of expounding the testator's intention.

It is true, in the last instance, the ambiguity does not conclusively appear, till from the words of the instrument the attention is directed to the predicament of the object to which the words apply, since, if in point of fact there never was but one son, that son would be entitled; but still it is obvious that the reference to external facts (if there were more sons than one) would not raise but confirm the ambiguity already attaching upon the words which in themselves express uncertainty, and suppose a plurality of individuals equally included within the *terms* of a gift intended for one only, and therefore present an ambiguity in the very face of the will (2).

(*t*) 2 Vern. 625. Amb. 175. 2 Mod. Cas. in Law and Equity, 122.

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(2) The following note is transcribed from Edward Altham's case, 8 Rep. 155, as furnishing several examples illustrative of the part of the subject above treated: "If A. levies a fine to William, his son, to have and to hold to him and his heirs; upon this fine the judge cannot make a question of any matter of law; but now the party comes and avers in fact, that A. had two sons, named William, an elder and a younger, and that his intent was to levy the fine to William the younger; this averment out of the fine is good of this

If the ambiguity occurs in the wording of a will, producing a palpable uncertainty on the face of it, extrinsic evidence cannot remove the difficulty, without

Of the marks respectively of a patent and latent ambiguity.

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matter of fact, *which well stands with the words of the fine*, and shall be tried by the country. But if a man by deed gives goods to one of the sons of J. S. who has divers sons, here it shall not be averred which son was intended; for by *judgment in law* upon this deed this gift is void for the uncertainty, which cannot be supplied by averment. So if a man levies a fine of the manor of S. or of the manor of D. to one *et hæredibus*, and in truth there is the manor of North S. and South S. or Great D. and Little D., in this case issue may be taken *dehors*, which manor the conusor intended to pass, for that is matter of fact, not apparent in the fine, whereof the judge cannot take conusance; but it *stands well* with the fine, and shall be tried by the jury. But where the words whereby the estate is limited are to two *et hæredibus*, that is apparent in the fine; and, by judgment of law, these words *et hæredibus* are uncertain and void, and no averment *dehors* can make that good which upon consideration of the deed is *apparent* to be void." Sometimes, however, there is a natural way of explaining the ambiguity by resolving it into a mistake. 1 Ves. 560. As where a testatrix gave and bequeathed unto *the two* servants that should live with her at the time of her death 100*l.* New South Sea stock to be equally divided between them; and in fact, though the testatrix had but two servants at the time of making the will, yet she afterwards took a third who lived with her at the time of her death. The Master of the Rolls, Sir Thomas Clarke, held that all the three servants should share equally; and his Honour added, that if a testator had four servants, and said, "I give to all the three servants living with me at my death," he thought all the four would be entitled to a share, and that the indefinite word *all* would have warranted the Court in rejecting the word *three* as repugnant. The ground of this construction was the maxim of "*ut res magis valeat quam pereat*," for otherwise the bequest would be void for uncertainty. His Honour also cited a case of Tomkins *v.* Tomkins, in 1745, where a testator gave to his sister 50*l.*; and to her three children 50*l.* each, and, in fact, there were four children of the sister; the Chancellor was of opinion that the words were indefinite, notwithstanding the word *three*, and were intended to take in all the sister's children. In Ongly *v.* Peed, 10 Mod. 103. where a man devised his land to A. and his brothers successively, and A. was by the verdict found to be the elder brother, the Court were of opinion, that the will was good and certain enough; for being in the case of brothers, the common law was a guide to the exposition of the word *successively*, viz. that the eldest should enjoy it first for his life, then the second, and then the third: especially when he who was first named in the will was by the verdict

putting new words into the mouth of the testator, and in effect making a will for him. As where the bequest is of a testator's best linen, it seems that nothing will pass. (*u*) Though this as well as every sort of ambiguity, uncertainty, or mistake, in a will may be explained by the context, or by passages of reference contained in the same will. (*x*) But if a will presents no ambiguity independently of facts, the uncertainty which arises must come from behind the instrument, and is in this consideration of the phrase with propriety called a *latent* ambiguity: and, indeed, to a certain extent extraneous evidence must be resorted to in establishing the title under any devise; since, let the words be ever so clear, the person designed can only bring himself within the description *in foro contentioso,* by proof of his identity.

The late Lord Kenyon Chief Justice of K. B., in the case of Thomas *v.* Thomas, 6 T. R. 676, makes this observation: "It has been a long established rule, that where there is a latent ambiguity in a will, the parties may go into extrinsic evidence to render that certain, which, without the aid of such evidence, is uncertain; but here the evidence has itself raised the ambiguity; on the face of the will there is no uncertainty." This passage seems to imply, that where there is no uncertainty on the face of a will, but the evidence *raises* the ambiguity, the case is incurable. Possibly, however, his Lordship did not mean to be *so* understood, since there would be little effect in the phrase of *latens ambiguitas,* unless it imported an ambiguity not existing on the face of the instrument, but lying behind in the dubiousness of the objects to which

(*u*) Fonnereau *v.* Poyntz, 1 Bro. C. C. 472.

(*x*) Milner *v.* Milner, 1 Ves. 105. Clarke *v.* Norris, 3 Ves. J. 362. Philips *v.* Chamberlaine, 4 Ves. J. 45.

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found to be the eldest brother. Had the devise been to A., B., and C., to take successively, it would have been void for uncertainty.

its provisions were directed, and therefore capable of being at once raised and explained by reference to those objects through the medium of external evidence. (3)

The truth will be found upon consideration to be, that the state of facts *raises* the *latent* ambiguity, (*v*) and may also *dissolve* it: but the *patent* ambiguity consists in the uncertainty of the language used, or in the vagueness of description or expression; and can be expounded only by the context and general sense of the instrument. Thomas *v.* Thomas (*x*) above referred to was a case of the *ambiguitas latens,* wherein the words of the will comprised a clear and certain description, but the parol or extrinsic evidence raised the doubts respecting the intention of the testator. The state of facts in that case created the latent ambiguity; which facts were shortly these:

Of mistakes in the appellation or description of persons.

The testator devised lands to Mary Thomas, his grand-daughter, of Llechlloyd, in Merthyr parish; and it turned out in fact that the testator, at the time of his death, had a grand-daughter, of the name of Elinor Evans, who lived at Llechlloyd, in Merthyr parish, and a great grand-daughter, Mary Thomas, an infant, of the age of two years, the only person of that name in the family: but it appeared that she lived at Green Castle, in the parish of Llangain, at the distance of some miles from Merthyr, in which place she had never been.

Here there was a person in existence to answer to the name in the devise; but she was neither the grand-daughter, nor living at Llechlloyd, in Merthyr parish; and there was another person, a grand-daughter, who was of Llechlloyd, in Merthyr parish, but to whom the *name* did not apply. The judge at Nisi Prius received the evidence (subject to the opinion of the Court as to its admissibility) to shew that the name of Mary Thomas

(*v*) 1 Bro. 85. (*x*) 6 T. R. 676.

(3) Where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence must be admitted, to ascertain the fact, and so to ascertain the subject of the devise. Hulme *v.* Heygate, 1 Meriv. 285.

was inserted by mistake for that of Elinor Evans: but the jury were not persuaded by it, so that the admissibility of that evidence did not come to be judicially decided. The contest between these claimants, to neither of whom the words of the disposition corresponded, opened the way by the uncertainty appearing on the parol evidence, for the title of the heir at law.

After it had been found that there was no mistake in the name, the question, of course, lay wholly between Mary Thomas and the heir at law; or, in other words, the only consideration which remained was, whether the description was applicable, with sufficient certainty, to entitle her as the object of the disposition; in which shape of the contest the distinction which has been above shewn to have been taken in Beaumont *v.* Bell, (*y*) in favour of those cases of defective *dispositions*, where the person intended was clearly perceived through the mistake, and no person was in existence to claim under the erroneous description, became very important; for though the jury had disallowed the pretensions of Elinor Evans, the Court thought that in as much as the description both of place and relationship was applicable to her, such a degree of uncertainty as to the person intended was thereby introduced as was sufficient to exclude the application of the maxim of *falsa demonstratio non nocet;* for that rule will only apply *si constat de persona.* (4) And therefore, as Elinor Evans could not take because nothing but the description or *demonstratio* belonged to her, and there was a person in

(*y*) 2 P. Wms. 241.

(4) But a true description will assist a wrong name, if there is no other person of the name. 2 Ves. 217. And if there is a *certain* description, and a further description is added, it is immaterial whether the superadded description be true or false. See Bradwin *v.* Harpur, Amb. 375. Which case presents an instance of a transposition of parties, the legacy intended for one being given to the other by a very evident mistake of the names. See this subject ably commented upon in Doe on dem. Harris *v.* Greathead, 8 East 91. See also 8 East. 149.

existence and claiming to whom the name applied; so neither was Mary Thomas suffered to take under the devise, because nothing but the name applied to her, and the description both as to place and kindred was precisely appropriate to another person in existence and contending for the preference on those grounds. (5) So also, where there was a bequest to James, the son of Thomas A., of Eastcheap, and there was no such Thomas A., but there was James A., of Eastcheap, who, by his first wife, a relation of the testator's, had a son named Thomas, and by his second wife a son named James, and Thomas claimed the legacy; Sir Lloyd Keynon, M. R. dismissed the bill.(z)

It is to be observed, that neither the Christian nor surname of Elinor Evans agreed with the name in the will: but where the mistake has been only in the christian name, and the instrument has contained a full and exact description of the person so *imperfectly* designated by *name,* although there has existed another person *wholly* answering to the name in *both particulars,* the particularity of the *description* has outweighed the advantage on the other side arising from the coincidence in both the Christian and surnames. As where the devise was to the Rev. Charles Smith, of Stapleford Tawney, in the county of Essex, clerk, and the legacy was claimed by the Rev. *Richard* Smith, of Stapleford Tawney, in the county of Essex, clerk, it was contended that one Charles Smith, an officer in the army, who had lived at Rumford, in Essex, and had been dead some time, was intended, and that so the legacy had lapsed. But

(z) Andrews *v.* Dobson, 1 Cox C. C. 425. In which his Honour said, there were cases where legacies were left to persons by nicknames; and evidence had been admitted to shew that the testator usually called them thereby.

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(5) In this case, the first ambiguity was *ambiguitas latens,* for it only appeared by reference to outward circumstances: but though extrinsic circumstances produced the ambiguity, they offered no media for its explanation; and this is the proper description of an incurable latent ambiguity.

it was proved by the widow of Charles Smith, that he died before the testatrix made her will; and, upon the Court's manifesting a decided opinion against the executor and trustee of the residuary legatee, the point was given up; and a decree was made of the legacy, with interest, but without costs, in favour of the plaintiff, the Rev. Richard Smith (*z*).

Where a testator bequeathed to his nephew A., the son of B., and the testator had not any brother of the name of B., but had two nephews of the name of A., the sons of two other brothers; parol evidence was admitted to prove which of them was intended. (*a*) And where a legacy was bequeathed to John and Benedict, sons of J. S., and J. S. had two sons, James and Benedict, but no son of the name of John, it was held that James should take. (*b*) In another case, where a supposed legatee was described by a wrong name, reference was ordered to a master in chancery, to ascertain whether that person was intended. (*c*) So where a legatee's name was mis-spelt, it was referred to a master, to see who was meant. (*d*) And where a testator bequeathed the interest of a sum of money to A., till her daughter B. attained twenty-four, and then added, "I give and bequeath the principal, and the interest then due, to her said mother, A.;" A., by her answer in Chancery, said she believed the legacy was intended for B., and it was accordingly decreed to be paid to B. (*e*)

The result seems to be, that wherever an ambiguity arises from the inapplicability of the name or description, as such ambiguity is produced by the state of facts, it is open to explanation by parol evidence, being

(*z*) 6 Ves. J. 42. Smith *v.* Coney; and see Parsons *v.* Parsons, 1 Ves. J. 266. Garth *v.* Meyrick, 1 Bro. C. R. 30.

(*a*) Careless *v.* Careless, 1 Meriv. 384. and see Goodinger *v.* Goodinger, 1 Ves. 231.

(*b*) Dorset *v.* Sweet, Ambl. 175. 2 Bro. C. C. 86. And see Stockdale *v.* Bushy, 19 Ves. J. 381. S. C. Coop. 229.

(*c*) Bradwin *v.* Harpur, Ambl. 374.

(*d*) 1 P. Wms. 425.

(*e*) Clarke *v.* Norris, 3 Ves. J. 362.

properly an example of the *latens ambiguitas:* but still the evidence, when let in, may increase instead of lessening the degree of uncertainty; or it may fall short of affording that degree of inference which is requisite to decide the Court or the jury.

Of the effect of a blank left for the name of a legatee.

Thus much as to mistakes in the names and descriptions of persons, by which, it appears, that very wide deviations and mistakes have been corrected by parol and extrinsic evidence. But when a *blank* is left for the name of a legatee or devisee, it is too much to set up an object of the testator's bounty by any description of evidence. Thus, in the case of Hunt *v.* Hort, (6) where the testatrix directed that her other pictures (having made some previous specific bequests of pictures) should become the property of Lady ——, the Chancellor said he could not supply a blank by parol evidence; though there certainly were some strong circumstances in the will itself to shew that Lady Hort was the person intended. But where there was a blank only left for the Christian name, evidence was without difficulty read to shew the testator's intentions with regard to the person answering to the surname. (*f*) And two initials of the person to whom a legacy is given have been filled up by parol evidence of the person intended (*g*).

Some ambiguities patent are not incurable.

It must be allowed, that, in the last instance, the rule of admitting parol evidence in the case of an ambiguity latent, and rejecting it when offered to expound an ambiguity patent, becomes a little unsteady. Where a testator gives a legacy to Mrs. G., it is not easy to shew that the ambiguity which this imperfect designation creates is not an ambiguity arising upon the face of the will, and, as such, an ambiguity *patent.*

(*f*) Price *v.* Page, 4 Ves. J. 680.
(*g*) Abbott *v.* Massie, 4 Ves. J. 148.

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(6) 3 Bro. C.R. 311; and the same point was adjudged in Baylis and Church *v.* the Attorney General, 2 Atk. 239.; and again in Castledon *v.* Turner, 3 Atk. 257.; and see Pym *v.* Blackburn, 3 Ves. J. 457.

Perhaps we must allow that the rule is flexible to the extent of admitting extrinsic evidence in a few particular cases, where the ambiguity, though *patent*, arises from something short in the expression or designation of the objects of the testator's intention, and is of a nature calculated to receive an easy explanation from outward facts.

Of the lights reflected upon particular passages by the context.

Although the effect of a positive clause (*g*) *is not* to be controuled by inference from other parts of the instrument; yet, if matter can be collected from the general context of the instrument, the *approach* to an ambiguity patent in a *particular* clause or sentence will not exclude the admission of parol evidence, provided it tends to confirm this collective inference from the context. Indeed, *that* can scarcely be termed an ambiguity, which is capable of an exposition from other parts, or from the bearing and scope, of the instrument. And it is generally true that where the context of the instrument reflects light upon an ambiguous passage, but not strong enough to decide the exposition with sufficient certainty, it may, nevertheless, afford a ground for the admission of extrinsic evidence. Perhaps, too, we may go a step further, and say, that where such internal grounds of construction are morally decisive, as may sometimes be the case, it may be doubted whether any extrinsic evidence can be received to contradict it; for instruments are not to be construed piecemeal, but illustration is to be borrowed (*h*) from all the parts of them to give light to particular passages.

In Ulrick *v.* Litchfield, (*i*) the ambiguity was also upon the *face* of the instrument: but there was a bearing in the language of the will that assisted the sense; parol evidence was therefore, as it seems, very consistently and properly admitted, to decide the preponderance. The devise in Castledon *v.* Turner, (*k*) upon

(*g*) Jones *v.* Colbeck, 8 Ves. J. 42.

(*h*) See Coker *v.* Guy, 2 Bos. and Pull. 565.

(*i*) 2 Atk. 372. (*k*) 3 Atk. 257.

which the question arose, was considered as receiving illustration from the other parts of the will, and from a natural order of preference, inferrible both from the instrument itself, and from the relation of the persons concerned; so that the particular uncertainty was expounded by a comparison with the general tenour and object of the will; yet the Lord Chancellor seemed to hold, that as it was a case in which there was an absolute omission of a devisee, no extrinsic evidence could be admitted. But the case, as it was regarded by his Lordship, did not stand in need of it, there being enough in the will for its own exposition. The point of the case was this:—W. bequeathed his lands to his wife for her life, and after her decease to M. D., the niece of his wife, and proceeded thus: "Item, I give the use of 500*l.* stock for *her* natural life: but after *her* decease, I give the 500*l.* among my wife's brothers and sisters." Lord Hardwicke considered this as a case of an absolute omission; and nearly the same as where a blank is left for the name of the devisee, in which case parol evidence is always excluded.

The courts will sometimes look out of the instrument, and infer the intention from the situation of the person or property.

Upon the whole, it appears, that whatever doubts may exist, whether in *any* case of a palpable ambiguity *patent*, help can be borrowed from mere parol evidence, consisting of *words* and *declarations*; yet it seems to be settled in practice, that if the Courts can, from the lights furnished by the instrument itself, gain some foundation of conjectural inference, they will look out of the instrument itself to the situation of the parties or persons concerned (7). Masters *v.* Mas-

(7) In the case of Crone *v.* Odell, Ball and Beatty's Reports of Cases in the Court of Chancery in Ireland, page 449. we find Lord Chancellor Manners thus expressing himself on this point: "An argument has been urged by the counsel for the defendant, (with a view to exclude the consideration of the state of the testator's family,) that the Court cannot travel out of the will for that purpose. The contrary, however, has been held to be law from the time of Wild's case, 1 Rep. 16. to the present time. In Goodinge *v.* Goodinge, 1 Ves. 231. the same argument was urged, and over-ruled by Lord

ters, (8) was a strong case decided on this principle. There a testatrix gave a sum of money *to all and every the hospitals,* without saying where the hospitals intended by her were: but because it appeared that the testatrix lived at Canterbury, and moreover that she took notice by her will of two Canterbury hospitals; the devise was held not to be void for uncertainty, but to have been intended for all the hospitals of Canterbury.

And, in a similar case, where there was a bequest to the charity school, in A., in which place there were two charity schools, one a free school, and the other supported by voluntary contribution, to which latter school the testator was a contributor, and expressed his concern for the same: it was held that the legacy should go to the last-mentioned school, it being commonly called by the name of the charity school. (*l*)

The same practice of looking out of an instrument to the situation of the parties concerned, for collecting inferences of intention, appears in the case of Harris *v.* the Bishop of London, (*m*) which was thus: Talbot Barker being seized in fee of a real estate, as heir on the part of his mother's mother, and being also seized in fee of a very small estate of *4l. per annum,* as heir of his own father, devised all these lands to trustees and their heirs, in trust to pay several annuities and charities; after payment of which, he devised the residue of the rents and profits of the premises to his own right heirs of his mother's side, for ever. And the question was, who should be entitled to the residue of the rents and profits; whether the heir of the mother's father, or the heir of the

(*l*) Atty. Gen. *v.* Hudson, 1 P. Wms. 675. (*m*) 2 P. Wms. 135.

Hardwicke; and his opinion on that point has been confirmed by the uniform decisions of courts of equity ever since.

(8) 1 P. Wms. 423. It appears, also, by this case, that a blank left in a codicil may sometimes be supplied from the will.

mother's mother. Here the Court looked *beyond* the will to the testator's title to the property devised; and finding it to be derived through the mother's mother, decreed it to go to the heirs of the testator on the part of his mother's mother.

This will perhaps appear, when properly considered, a stronger case than that of Masters and Masters; for although the extraneous matter was not introduced to explain an ambiguity patent, since, in the words of the will, there was no ambiguity at all; yet it was certainly resorted to by Lord Macclesfield, to annex a meaning to words beyond their legal effect; the "right heirs of the mother's side" being a description properly applicable, in the first place, to the heir of the mother's father; nevertheless, as we have seen, the Court gave the estate to the heir of the mother's mother, in deference to the argument drawn from the manner in which the estate had in fact devolved to the testator. And it is to be further noted, that in this case the Chancellor did not look out of the will to the title to the property (12) for the sake of deciding the judgment already inclined the same way by the context of the instrument, for it does not seem that the will afforded any internal evidence.

But the want of this internal evidence in the will itself, to justify the resort in the last-mentioned case to the external facts, makes the propriety of that decision at least *questionable,* if we regard the authorities on this head. And, perhaps, the consistency of legal principles was better consulted by the firmness of the decision of Lord Talbot, in the case of Brown *v.* Selwin, (*y*) which was shortly as follows: John Brown

(*y*) Cas. temp. Lord Talbot, 240.; and see 4 Bro. P. C. 179.

(12) There are numerous cases wherein the descriptive force of words have been determined by reference to the circumstances of the property; as where words, inapplicable in their proper sense to leaseholds or copyholds, have been held to include them in reference to the actual situation of the testator's property.

made his will; and, after several dispositions of real and personal property, devised as follows: "And as to the rest, residue, and remainder of my estate, whether real or personal, whereof I am seised or possessed, or to which I am any ways entitled, I give and bequeath the same, and every part thereof, and all my right, title, and interest therein and thereto, unto such my executor or executors hereinafter named, as shall duly take on him or them the execution of this my will, his or their heirs, executors, administrators, and assigns, as tenants incommon, and not as joint-tenants." And the testator afterwards appointed the plaintiff and defendant his executors, and died; and the plaintiff and defendant both proved the will. The defendant was, at the time of the testator's death, indebted to him in *3000l.*; and, for securing the same, had given a bond to the *testator.* (13) The prayer of the bill was, that the defendant might account with the plaintiff for the testator's residuary property, and pay to him a moiety of the said sum of 3000*l.* with interest; and the cross bill was brought to have the bond delivered up to be cancelled. It appeared by the answer of the defendant in the original cause, and by the proofs, (14) that the testator really designed to give this money to the defendant, and that he had actually instructed one Viner, the attorney who

(13) In equity, a debt is not released by a creditor's making his debtor his executor: but at law it is otherwise. And if a creditor makes his debtor *and another* his executors, the consequence at law is still the same. Nor is this consequence varied by the fact of the debtor's administering, or not administering; the reason whereof is this, that the other cannot bring an action without joining him who refuses, and they cannot sue one of themselves for a personal thing. See this doctrine well treated of, in Plowd. Comm. 184. Woodward *v.* Lord Darcey.

(14) In Courts of Equity, these parol proofs are generally permitted to be read without prejudice. But at law, where the jury might, and probably would, be influenced, by the admission of such improper testimony, the production of it will not be allowed. See this distinction adverted to by Mr. Justice Powell, in Newton *v.* Preston, Prec. in Ch. 104.

drew the will, to make this disposition accordingly; who neglected to make mention of it in the will, insisting that the bond would be extinguished and released, of course, by Selwyn's being appointed executor; but that the testator appearing dissatisfied with Viner's opinion, a case was laid before counsel, who confirmed what Viner had said, relying upon which, the testator signed and published his will, with a full persuasion that the bond would be extinguished; and this appeared clearly to have been the intention of the testator.

It was impossible for parol evidence to be more decisive than that which was offered in this case, if it could have been received: but it is equally plain, that if the will were considered without the parol evidence, and the general devising words giving all the real and personal property, not before disposed of, to the residuary legatees, were only attended to, this debt was included in the bequest, as falling under the description of personal estate. The Chancellor, although he declared it to be his private opinion that the debt was intended to be released to the executor, by whom it was owing, thought himself not at liberty to yield to the evidence, and to make a construction against the plain words of the will.

But although the case of Brown *v.* Selwyn is not easily reconcileable with that of Harris *v.* the Bishop of London, yet it is not opposed to the doctrine of the admissibility of parol and extrinsic evidence, to decide the judgment already strongly inclined by the context and internal indications of the instrument itself.

Mistake or misdescription may be rectified by extrinsic evidence.

In general, mere mistake or misdescription will admit of being set right by the parol disclosure of extrinsic circumstances. Thus, in a recent case (*z*) where a testator had given certain legacies of stock, being part of stock standing in his name in the Bank of England, and in fact he had no stock in his own name, but the stock to which he was entitled was standing in the name of trustees; it was held by Sir J. Leach, V. C. that parol

(*z*) Hewson *v.* Reed, 5 Madd. 451.

evidence of this fact was admissible, and that the stock standing in the names of trustees would pass by the will.

The case of Dobson *v.* Waterman (*a*) at the Rolls is a strong example to the same point. A testator, in 1784, bequeathed the sum of 700*l.* capital stock, in the 3 per cent. consolidated Bank Annuities, part of the stock of that denomination then standing in his name, in the books of the Bank of England, unto his nephew J. D.; and he gave all the residue of his stocks in the public funds, and of his personal estate to T. D., and appointed executors: but he was not in fact either at the date of his will, or at his death, possessed of any kind of stock at the Bank; but he was possessed of 1,800*l.*, 3 per cent South Sea Annuities of the year 1751.

The Bill was filed to have this legacy of 700*l.* satisfied by the transfer of so much of the South Sea Stock; in opposition to which it was insisted that the legacy was a specific legacy, and void, as the testator had nothing to answer it: but Sir Lloyd Kenyon, M. P., decreed the executors to transfer the 700*l.* S. S. Annuities. to the plaintiff for his legacy; observing that the state of the testator's property made it manifest that he was under a mistake as to the particular stock belonging to him, and that he certainly intended to give the sum of 700*l.* of whatever stock it made a part.

Again, a testator gave to his wife the interest and proceeds of 1,250*l.* part of his stock, in the 4 per cent. annuities, of the Bank of England, for her life; and after the decease of his wife, bequeathed the said stock to others, always as his 4 per cent stock; and it appeared in evidence that about four years before making his will, he had sold out 3,200*l.* 4 per cent bank annuities; and at different times invested the same in the purchase of long annuities; and it further appeared that the mistake had arisen from the testator's giving to his attorney, as part of the instructions of his will, a former

(*a*) 3 Ves. J. 308. note.

will made before the sale of the 4 per cents, without apprising him of that circumstance. It was held by the Master of the Rolls, Sir R. P. Arden, that the legatees were entitled to their legacies out of the personal estate of the testator. (*b*)

We may safely say that there is no rule which stands on a surer principle than this—that parol evidence is never to be admitted where there is no ambiguity to call for explanation, and where the will may operate according to the words without any such foreign help. If, on the other hand, there is no subject on which the words in their ordinary and received sense can operate, extrinsic evidence may be called in. But an intention in the testator beyond the natural meaning of the expressions used is never to be gratuitously inferred. Thus in a late case in the Common Pleas, where there was an estate sufficient to satisfy the devise according to the proper meaning of the description of the premises, collateral evidence was held not admissible to shew that the testator meant to use the description in a more extensive sense. In that case the devise was of "all my estate of Ashton." The testator had an estate from the mother's side, and also a paternal estate. His maternal estate comprehended a manor, capital farm, and lands in the parish of Ashton, as well as several other estates, some in an adjoining parish, and some in parishes at the distance of ten or fifteen miles from Ashton. It was attempted to be shewn that the testator was always accustomed to call his maternal property his 'Ashton estate,' to raise the inference that he intended to devise the whole of his maternal estate by the name of his 'estate of Ashton:' but the Court refused the evidence. (*c*)

(*b*) Selwood *v.* Mildmay, 3 Ves. J. 306.

(*c*) Doe d. Sir Arthur Chichester, Bart. *v.* Oxenden, 3 Taunt. 147.

SECT. V.

Rules of construction not to be opposed by extrinsic evidence.

UPON the whole, the distinction, according to Lord Thurlow, seems to be this: that all sorts of evidence are admissible, with different degrees of weight and value, to rebut presumptions of equity; (1) and even that constructive operation of an instrument which is referrible to presumption: but that where the question arises upon the construction of words, *qua* words, no extrinsic evidence can be admitted; still less can it be received to controul a technical rule of verbal construction. (2)

Some equitable rules too strict to depend upon evidence of intention.

There are some equities arising upon written instruments, the strict and technical nature of which seems to place them clearly out of the reach of parol evidence; by which are meant those which do not arise out of the presumable intention, or the moral and conscientious relations of parties; but out of an artificial system of jurisprudence, the maxims of which can be neither steady nor clear unless pursued to their consequences, and kept uniform in their application. This observation holds especially with respect to the rules which govern the succession to property; to which some equitable canons apply of a merely *positive* nature, and which are grounded on political usage and relations long laid aside. Such appears to be the rule which fa-

(1) It has long been fully settled, that parol evidence is admissible to rebut a resulting *use*, Lord Altham *v.* the Earl of Anglesea, 2 Salk. 676. See also Roe, lessee of Roach, *v.* Popham and Others, Dougl. 2.

(2) When certain words have received a certain technical construction, we must abide by the decisions in construing such words; otherwise we shall be removing land-marks. By Kenyon, C. J. and Lawrence, J. 6 T. R. 354.

vours the real representative, by applying the personal estate in exoneration of the land, though *expressly* charged by the testator;—a rule derived to us from the ancient policy of our ancestors, which has impressed on the law of landed property its inveterate preferences in favour of the heir, whom it was anxious to qualify with the means of sustaining the duties of the feudal relation. Though it may be observed that the abolition of the feudal tenures, and the growing interests of commerce, have made the courts very ready to take cases out of a rule, which is considered as not agreeable to the situation of the times. Still, however, it is left standing; and, though living in dishonour, is of general obligation in courts of equity.

The descriptive force of certain technical expressions not to be opposed by extrinsic evidence.

So too the rules which apply to and modify the titles to real and personal property, (wherein the courts of equity hold a perfect agreement with courts of Law), as, for example, such as concern the rights of representation and administration, the quantity of estates expressed by certain legal idioms, the compass and effect of limitations, and the descriptive force of technical expressions, are not to be shaken by extrinsic evidence. Thus, that rule of construction which makes void a remainder of personal estate, limited upon a prior gift or assignment of the same to a man and the heirs of his body, and vests the absolute and ultimate interest in the first grantee or devisee, cannot be opposed by parol evidence. Accordingly, in Stratton *v.* Payne, (*a*) where the testator devised his personal as well as real estate to A. P. and the heirs of her body, with a limitation over in default of issue of A. P., the limitation over was adjudged void both by the Court of Chancery and the Lords, who concurred in rejecting parol evidence, (though it was the evidence of the person who drew the will,) to shew an intention in the testator opposed to this construction.

(*a*) 3 Bro. P. C. 257.; and see Lord Chatham *v.* Tothill, 6 Bro. P. C. 450. See also Britton *v.* Twining, 3 Meriv. 176.

Again, it is a rule of construction in courts, both of law and equity, that a devise to a man, his heirs and assigns, or a bequest to one and his executors, administrators, and assigns, conveys no original interest to the representatives, but by transmission only; and that consequently the devise or legacy fails if the devisee or legatee die before the testator; and this construction, though it operates to destroy *pro tanto* the will, cannot be opposed by parol evidence of the testator's contrary intention as to the devisee; which point was decided so long ago, as in the case of Brett *v.* Rigden, in Plowden's Commentaries (*a*) upon the statutes 32 and 34 Hen. 8. of Wills (which, like that of the 29th Car. 2, require a will to be in writing;) where the evidence offered of the testator's declaration of his bountiful intention towards the heir of the deceased devisee was rejected, as being in derogation of those statutes; and the same doctrine has been applied to a bequest of personal estate to the legatee and his executors in a modern case.(*b*)

Nor the fixed and determined import of certain words in an instrument.

Nor can parol evidence of intention be received to vary the signification and compass of words, where the law has settled their import. (*c*) For example, the sense and scope of the word *relations*, without any other words in the will to define its extent, has been adjudged to comprehend only the next of kin, according to the statute of Distributions; and extrinsic evidence will not be let in to shew that the word was used by the testator with a greater or less expansion. (*d*)

(*a*) 345.

(*b*) Maybank *v.* Brooks, 1 Bro. C. C. 84. See the case of Doe dem. Turner *v.* Kett, 4 T. R. 601. A. devised to B., and to the heirs of her body. B died in the lifetime of A.; who afterwards, with full knowledge of the death of B., and the fact of her having a son who survived her, confirmed his will by a codicil: and it was held that the heir of B. took nothing.

(*c*) See Kelly *v.* Paulett, Ambl. 605.

(*d*) See Whitethorne *v.* Harris, 2 Ves. 257.; Roach *v.* Hammond, Prec. in Chan. 461.; Harding *v.* Glyn, 1 Atk. 468.; Green *v.* Howard, 1 Bro. C. C. 31.

SECT. VI.

Presumptive Trust in the Executor, as to the surplus undisposed of by the Will.

The executor is a trustee for the next of kin, whenever the testator either manifests an intention to give him only the office, and not the benefit which the law attaches to it; or to give the residue away from him.

AN executor has been called "a legal residuary legatee," (a) as by the rule of law the whole of a testator's personal property undisposed of by the will vests in him: but in equity, whether he takes it for his own benefit, or for the benefit of the next of kin, is a question to be determined by inference of intention. With respect, indeed, to the general right, equity agrees with the law in holding the executor entitled beneficially to all the residue of the personal estate, unless the will furnishes the implication of an intention in the testator to give him only the office, and not the benefit which the law attaches to it. But the implication must be a strong one, arising from the instrument itself, to exclude the executor from his general right of beneficial enjoyment, and to justify the Court in turning him into a trustee for others of that which the law has given him. Though it seems to have been thought by Lord Macclesfield, who was a chancellor of great penetration, that an executor should be considered, *prima facie*, as a bare trustee, and ought never to have any beneficial interest beyond what is expressly given him by the will. (b)

In the Bishop of Cloyne *v.* Young, (c) the doctrine was explicitly laid down as it stands at this day, that, by the mere appointment of an executor, the residue is given to him, unless there is a strong and violent presumption that he was not intended to have it. The same doctrine has been propounded with equal force by succeeding Judges, and is now undoubted law. (d) As

(a) Wilson *v.* Ivat, 2 Ves. 167. Per Sir J. Strange, M. R.

(b) See Farrington *v.* Knightley, 1 P. Wms. 553.

(c) 2 Ves. 96.

(d) See Clennell *v.* Lewthwaite, 2 Ves. J. 471., Dicks *v.* Lambert, 4 Ves. J. 729., Pratt *v.* Sladden, 14 Ves. J. 197.

the testator's intentions, however, are to be collected from all parts of his will, a great diversity of reasoning and inference must necessarily attend the application of the rule, according to which the Court controuls the *prima facie* title of the executor. And it was forcibly observed by the Master of the Rolls, in the case last above referred to, that "it is impossible to lay down any rules to prevent the frequent recurrence of the question; for as it is always open to the next of kin to shew intention from the particular wording of the will, adverse to the effect of the legal appointment of an executor, the circumstances from which it may be endeavoured to deduce that intention may be infinitely varied."

Some of the safest and most applicable rules which are furnished by the decided cases appear to be the following:

If the testator shews an intention to give the residue away from the executors, though his bequest should fail, as where he gives it in the manner he shall afterwards appoint, and he makes no appointment, (*d*) or where a blank is left for the residuary devisees, (*e*) or where the legacy is void under the mortmain act, (*f*) the executors are not entitled; for a contrary intention in the testator sufficiently appears, and the whole question turns upon the point of intention. Upon the same principle, if a testator, after naming his executor, gives all his residuary estate to another, and such legatee dies in the testator's lifetime, the executor is nevertheless a trustee for the next of kin. (*g*) It has been held, also, that, if a testator gives the residue to several persons in common, which persons are named executors, and one of them die in the lifetime of the

(*d*) Davers *v.* Dewes, 3 P. Wms. 40.; and see Dawson *v.* Clarke, *supra.*

(*e*) *Ibid* (*f*) *Ibid.*

(*g*) Nicholls *v.* Crisp, Ambl. 769. Bennet *v.* Batchelor, 3 Bro. C. C. 28. And see Androvin *v.* Poilblanc, 3 Atk. 299.; Peal *v.* Chapman, 1 Ves. 542.

testator, his share shall belong to the next of kin. (*h*) And the consequence will be the same if the whole residue is bequeathed to two as tenants in common, and one is appointed executor, and the other dies in the testator's lifetime, the executor will hold the share of the person so dying as a trustee for the next of kin. (*i*) And where a sentence in a will has begun thus: "I give to A.," and then stopped, the executors have been declared trustees of the residue. (*k*)

But not every manifestation of intention to dispose of the whole residue will operate to exclude the executor. The testator must indicate an intention to give it away from the executor. If, therefore, he begins his will with a declaration of his design to dispose of all his worldly estate, without actually disposing of it, or shewing an intention to dispose of it to some *particular person* or *object*, the executor will still be entitled; for the very appointing an executor is virtually a disposition, and is therefore not only consistent with such announcement in the preamble of the will, but is a fulfilment thereof.

If a particular legacy is void, or revoked, or lapsed, it will sink into the residue; and if the executor is not barred of the residue, by the disclosure of an intention to deprive him of it, he will take as a part of the residue the subject of such inoperative bequest; the rule being, as laid down in Dawson *v.* Clarke (*l*) by the Master of the Rolls, that the executor takes the residue precisely in the same plight as a residuary legatee. And even if a particular legacy is bequeathed by a testator to his executor in trust for C., and C. dies in the lifetime of the testator, the executor, if not excluded from the residue, will be entitled to this lapsed subject beneficially. (*m*)

(*h*) Page *v.* Page 2 P. Wms. 489; and see Owen *v.* Owen, 1 Atk. 494.

(*i*) Painter *v.* Salisbury, cited in 2 Ves. Sen. 93.

(*k*) 2 Ves. 91, 93. Gilb. Rep. 184. But see per Lord Eldon in Langham *v.* Sandford, 19 Ves. J. 650.

(*l*) 15 Ves. J. 415, 417. (*m*) Pratt *v.* Sladden, 14 Ves. J. 199.

And there is no difference as to this right of the executor between a general and specific bequest. (*n*)

If a testator expressly makes his executor a trustee of the residue, though he should omit to specify any trusts, or the trusts declared should fall short of exhausting the whole interest, the executor cannot, as executor, take beneficially the unexhausted residue, but must stand possessed thereof, in trust for the next of kin of the testator. (*o*)

If, however, from the tenor or context of the will, it can be collected that the testator intended the executors to take the property absolutely, subject only to a charge for the benefit of those in whose favour certain trusts are declared not exhausting the whole interest, in such case the executors take so much as is unexhausted by the trusts for their own benefit; not as executors, and in right of their office, but rather in the character of legatees, to whom property is bequeathed, subject to certain trusts for other persons so expressed, or so explained, as to shew that when such trusts are satisfied, they were designed to have the full benefit of the surplus. (1)

(*n*) Wilson *v.* Ivat, 2 Ves. 166.

(*o*) Robinson *v.* Taylor, 2 Bro. 589. Milnes *v.* Slater, 8 Ves. J. 308. Pratt *v.* Sladden, 14 Ves. J. 198. And see per Lord Eldon in Dawson *v.* Clark, 18 Ves. J. 256.

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(1) Dawson *v.* Clark, 18 Ves. J. 247. A similar question may also arise in the case of a devise of real property, with particular trusts, or subject to charges and partial dispositions of the rents and profits, for the benefit of others, but without any express disposition of the beneficial residue, whether such residue is to remain with the devisee, or to become a resulting trust for the heir at law. This was the point in the case of King and Denison, 1 Ves. and Beames 260; in which the Court, collecting the intention from the whole of the will, construed it a beneficial devise, and not a resulting trust.

Lord Eldon observed, that the principles applicable to the case were well settled, and he adopted those expressed in Hill *v.* the Bishop of London, 1 Atk. 618. as affording the grounds upon which Lord Hardwicke proceeded. The distinction, his Lordship said, upon

If a legacy, whether pecuniary or specific, is given to an executor, a presumption is considered as thereby created against his beneficial title to the residue, which presumption rests upon the implied exclusion from the whole, by an express gift of a part; the solidity of which argument, however, has been frequently questioned by great authorities. (*p*) And as the proper ground of the presumption is the inconsistency of the express particular gift with the virtual gift of the whole residue to the executor, wherever the legacy is so given to him as not to be inconsistent with his taking the full benefit of his legal title, he is not to be deprived of it by the legacy: so that from the vast variety of

A legacy to the executor, generally makes him a trustee.

(*p*) See Bishop of Cloyne *v.* Young, 2 Ves. 97. Urquhart *v.* King, 7 Ves. J. 229. King *v.* Dennison, 1 Ves. and B. 278.

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which the Court had gone, was this. If I give to A. and his heirs all my real estate, charged with my debts, this is a devise to him for a particular purpose, but not for that purpose only. If the devise be upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. The former is a devise of the estate of inheritance, for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give to the devisee the beneficial interest. This, he observed, was the meaning of the several passages in Hill *v.* the Bishop of London, and other cases before Lord Hardwicke, who mentioned it as a ground of distinction that the word *trust* was not made use of. That was a circumstance to be attended to, but nothing more. If the whole frame of the will created a trust, for the particular purpose of satisfying which the estate was devised, the law was the same, although the word *trust* was not used.

The case just adverted to turned mainly upon the distinction between a direct trust and a charge, or a devise upon trust and a devise subject to a charge; though in equity these objects are enforced in the same way. And it was considered by the Court to be very clear that a devise, after a direction that all the debts should be paid, amounted only to a charge. This, then, was the ground of the decision: though the Court gave some weight to the circumstance that the devisees were infants, whom it was difficult to consider as intended to be trustees; and also to the fact, that the heir took a benefit under the will.

cases upon this subject we come out with this safe general position that, where a legacy is consistent with the executor's assertion of his legal right to the whole, he shall not be thereby excluded from it. (*c*)

Where legacies are unequal, executors not deprived of the residue.

Unequal legacies to two or more will not take from them their claim to the residue, as by such inequality in the bequests to them the testator may reasonably be supposed to have intended to make the benefit of the one greater than that of the other, notwithstanding their equal title to the undisposed of residue. (*d*) And it is said, that the executors are not made trustees, by specific legacies to each of them, on account of the inequality of benefit which they may be supposed to take in such a case. (*e*) If in some cases, where they have had unequal legacies, they have been declared trustees, those cases have either turned upon other reasons, or have been disapproved of by weighty authorities.

The same reasoning holds where a legacy is given to one only of two executors. (*f*) Though it has been said that a bequest to one of two executors for his care, makes them both trustees. (*g*)

Nor where a legacy is by way of exception out of a legacy to another person.

Where a gift to an executor is only an exception out of another legacy, he is not thereby excluded, for such a reserve out of a bequest to another person is not inconsistent with his taking the residue. As, if a library be bequeathed to J. S., out of which the executor is to select a certain number of books for himself, it is no exclusion

(*c*) Bowker *v.* Hunter, 1 Bro. C. C. 332. Hornby *v.* Finch, 2 Ves. J. 80.

(*d*) Bowker *v.* Hunter, 1 Bro. C.C. 328. Oliver *v.* Freiven, *ibid.* 589. Griffiths *v.* Hamilton, 12 Ves. J. 298. Rawlins *v.* Jennings, 13 Ves. J. 39.

(*e*) Bishop of Cloyne *v.* Young, 2 Ves. 97.; and see Blinkhorn *v.* Feast, *ibid.* 29. and the note by Mr. Cox, to Farrington *v.* Knightley, 1 P Wms. 550.

(*f*) Dawkins *v.* Mason, 4 Bro. P. C. Ed. Toml. 7; and see Blinkhorn *v.* Feast, 2 Ves. 29.

(*g*) White *v.* Evans, 4 Ves. J. 22. Both the executors had legacies, and one for his care and trouble: but no evidence was offered in favour of him whose legacy was not for his care and trouble.

from the residue. (*h*) Nor will a gift of only a limited interest operate to his prejudice; (*i*) as such a legacy is considered in the light of an exception out of the entire interest.

A legacy will not raise the presumption against an infant executor.

If an executor be an infant, it is said that a legacy to him shall not deprive him of the residue; for the presumption in such a case is, that a benefit and not a trust was intended. (*k*)

Where a legacy is given to the executor for his trouble, the presumption is preremptory against him.

Where a legacy is given to an executor for his care and trouble, (*l*) or where the will directs that he shall be paid for his trouble, (*m*) he is considered as excluded from the residue.

And wherever the testator shews that he regards his executors as having a mere official duty, they become trustees: thus where, after naming executors, he entreated them to take the trouble of getting in his estate, they were held by these words to be excluded from any benefit in the undisposed of residue. (*n*) So if the executors are requested to be so kind as to take upon themselves the execution of the will. (*o*)

Whether a legacy for mourning raises the presumption against the executor.

It is of no importance as to the inference from the bequest to the executor, whether the legacy be great or small. (*p*) A bequest of a sum for a ring has operated to exclude him. (*q*) And so where a legacy of 20*l.* was given him for mourning, the surplus was decreed to be distributed. (*r*) But the point has been variously de-

(*h*) 1 P. Wms. 550. n. 1. Griffith *v.* Rogers, Prec. in Ch. 231.

(*i*) Lady Granville *v.* Duchess of Beaufort, 1 P. Wms. 114. Jones *v.* Westcomb, Prec. in Ch. 316.

(*k*) Lamplugh *v.* Lamplugh, 1 P. Wms. 112. See also Blinkhorn *v.* Feast, 2 Ves. 30.; Williams *v.* Jones, 10 Ves. J. 77.

(*l*) Rachfield *v.* Careless, 2 P. Wms. 157.; and see Farrington *v.* Knightley, 1 P. Wms. 549 n. See also Abbott *v.* Abbott, 6 Ves. J. 225, and the cited cases.

(*m*) Dean *v.* Dalton, 2 Bro. C. C. 636.

(*n*) Cordell *v.* Noden, 2 Vern. 148.; and see 1 Bro. C. C. 331.

(*o*) Lord North *v.* Purdon, 2 Ves. 496. Selley *v.* Wood, 10 Ves 71.; and see Giraud *v.* Hanbury, 3 Meriv. 150.

(*p*) Wilson *v.* Ivat, 2 Ves. 166.

(*q*) Nisbett *v.* Murray, 5 Ves. 158.

(*r*) Cook *v.* Walker, cited 2 Vern. 676.

termined. Thus, in Wilson *v.* Ivat, (*s*) it was thought by Sir J. Strange, that if mourning was left to all the relations, the executor being one, this would not be such a legacy as to raise a trust for the next of kin. And Lord Hardwicke, in Buffar *v.* Bradford, (*t*) expressed an opinion that a legacy to the executor for mourning for himself and his wife and children should not exclude him from the residue. Sir William *Grant* went no further in Southhouse *v.* Bate, (*u*) than to say that *in some cases*, a legacy for mourning had been held sufficient to turn executors into trustees.

The relationship of the executor to the testator, how it operates with respect to the presumption.

The relationship of the executor to the testator will not prevent the inference in favour of the next of kin, if a legacy is given to such executor by the will. Although if parol evidence is let in, such a circumstance *might* afford a corroborative argument to rebut *the presumption*. Thus, in Petit *v.* Smith, (*x*) where the executors were testator's brothers; and in Carey *v.* Gooding, (*y*) where they were the testator's brother and nephew; they were declared trustees, having in both those cases legacies of an equal amount. And it is now well settled, that if the next of kin has a legacy, this will not prevent the resultancy of a trust for his benefit from the executor's having also a legacy. (*z*) And where the legacy to the next of kin was one shilling only, the executor having a legacy was construed a trustee for the next of kin. (*a*) But in Thornton *v.* Tracy, (*b*) Sir P. Arden thought that, though the legacy of one shilling would not of itself prevent the resultancy, it might be a strong circumstance coupled with parol evidence.

A legacy to the next of kin will not prevent the resultancy.

(*s*) 2 Ves. 166.
(*t*) 2 Atk. 222.
(*u*) 2 Ves. and B. 399.
(*x*) 1 P. Wms. 7. And see Newstead *v.* Johnson, 2 Atk. 46.
(*y*) 3 Bro. 110.
(*z*) See Farrington *v.* Knightley, 1 P. Wms. 544; and see 2 P. Wms. 213., 2 Atk. 45., 2 Ves. 496., 1 Bro. C. C. 532., 10 Ves. J. 5., 12 Ves. J. 309.
(*a*) Andrews *v.* Clark, 2 Ves. 162.
(*b*) 2 Ves. J. 465.

If a testator makes his wife his executrix, and gives her a legacy, she is thereby made a trustee for the next of kin. (*c*) But she will still be entitled to her share, with the next of kin, under the statute of Distributions. (*d*) And it is to be observed, that if the bequest to the wife executrix be of a part of her own fortune; (*e*) or of her wearing apparel, watch, and rings; she is not thereby made a trustee of the residue; for these things would belong to her without the will, as her paraphernalia.

A joint legacy, whether pecuniary or specific, would obviously operate, like equal legacies, to raise a trust for the next of kin. (*f*) And where executors have equal legacies, a devise to them by the same will of a real estate in unequal proportions will not prevent the presumption against them arising from the equal personal legacies. (*g*)

The situation of the persons named executors has sometimes of itself operated in favour of the next of kin; as where a partnership firm were made executors: (*h*) and, in another case, where a testatrix appointed the then American ambassador, or such other person as should be the American ambassador at the time of her death, to be her executor, Sir Wm. Grant thought that a corroborative inference might be drawn from the situation of the party so appointed. (*i*)

If an executor is not made a trustee of the whole residue, but only of a particular fund, he does not thereby become in equity, a trustee for the next of kin. (*k*)

(*c*) Gobsall *v.* Sounden, 2 Eq. Abr. 444. Martin *v.* Rebow, 1 Bro. C. C. 154. Ward *v.* Lant, Prec. in. Ch. 182. Lake *v.* Lake, Ambl. 126.

(*d*) Gobsall *v.* Sounden, 2 Eq. Abr. 445. Martin *v.* Rebow, 1 Bro. C. C. 154.

(*e*) Lawson *v.* Lawson, 4 Bro. P. C. Ed. Toml. 21.

(*f*) Skrimpton *v.* Stanhope, cited 3 Atk. 230.

(*g*) Muckleston *v.* Brown, 6 Ves. J. 64.

(*h*) De Mazar *v.* Pybus, 4 Ves. J. 644.

(*i*) Urquart *v.* King, 7 Ves. J. 230.

(*k*) Pratt *v.* Sladden, 14 Ves. J. 198.

But if certain persons are named executors, and in a distinct clause of the will receive the appellation of trustees, it seems, that such a designation of them will alone deprive them of their right to the residue undisposed of. (*l*) If, however, the persons appointed executors are also made trustees of a particular part of the testator's property, the mere appellation of trustees afterwards given to them by the testator will not make them trustees for the next of kin, being applicable to them only in relation to the particular trusts. (*m*)

Whether a reversionary interest given to the executor excludes him from the residue.

A reversionary interest given to the executor after a life interest was considered in the case of Seley *v.* Wood, (*z*) by Sir W. Grant, as sufficient to exclude him from the residue; in which it is to be observed that, the whole interest in reversion was given to the executor. Had the interest given to the executor been for his life only, as his ever coming into the actual possession would, in such case, be doubtful, it might well be questioned whether such a gift would have been of force to deprive the executor of his claim to the residue. The opinion of Lord Eldon, in Lynn *v.* Beaver, (*a*) seems to have leaned strongly in favour of the executor's claim, when opposed only by such a precarious interest in the reversion.

A conditional or qualified legacy, not an exclusion.

It has been held, also, that a conditional or qualified legacy will not turn the executor into a trustee of the residue for the next of kin. As in the case of Nourse *v.* Finch, (*b*) where a legacy was given to an executrix, provided she did not marry; and if she married then to another; Buller J. (sitting for the Lord Chancellor) held the executrix not excluded from the residue. The same opinion was pronounced by Lord Thurlow, in Bowker *v.* Hunter, (*c*) in respect of a qualified legacy; and a

(*l*) Pratt *v.* Sladden, 14 Ves. J. 198.

(*m*) Butteley *v.* Windle, 2 Bro. C. C. 31. Pratt *v.* Sladden 14 Ves. J. 198.

(*z*) 10 Ves. J. 75.

(*a*) 1 Turn. 63. (*b*) 1 Ves. J. 356. (*c*) 1 Bro. C. C. 332.

contingent legacy comes under the same reason and principle, for which the case of Jones *v.* Westcombe (*d*) is an authority.

Executor must have the beneficial interest in the legacy to exclude him.

If the executor is made a trustee of the legacy, no presumption is thereby raised to exclude him from the residue; for, in fact, nothing is given him. (*e*) And it is upon an equally clear principle, that a legacy given in trust for the executor will exclude him from the residue, as much as if it had been bequeathed immediately to himself. (*f*)

Executor not made a trustee of the residue by a devise to him of real estate.

A devise of real estate ought not to raise any presumption to defeat the executor, as such a gift stands in no inconsistency with the supposition of his being intended to take the residue of the personalty. Therefore, where a testator devised a rent charge to his executor, his claim as such to the residue was considered as unaffected thereby. (*g*)

Whether if a legatee under a will be made executor by a codicil to the same, or if after the appointment of an executor by the will, a legacy is given to such executor by a subsequent codicil, he is, in either case, excluded from the residue, are points as yet undecided; though the leaning of the Courts appears to be against the executor. (*h*)

Where one of two executors has a legacy.

Where two executors are appointed, and to one of them a legacy is given for his trouble, such one is necessarily excluded by the form of the legacy: but whether against the other only a presumption from this circumstance arises in favour of the next of kin, subject to be rebutted by evidence, or a con-

(*d*) Prec. in Ch. 316.; see Nisbett *v.* Murray, 5 Ves. J. 158. and see Lynn *v.* Beaver, 1 Turn. 63.

(*e*) Bishop of Cloyne *v.* Young, 2 Ves. 97.

(*f*) See per Lord Hardwicke, in Newstead *v.* Johnson, 2 Atk. 47.

(*g*) Per Sir W. Grant, in Langham *v.* Sandford, 17 Ves. J. 449. Lady Granville *v.* the Duchess of Beaufort, 3 Bro. P. C. 37.; and see Wilson *v.* Ivat, 2 Ves. J. 166.

(*h*) 2 Meriv. 21, 22. Holford *v.* Wood, 4 Ves. 90.; and see Muckleston *v.* Brown, 6 Ves. J. 74.

structive conclusion, not to be rebutted by evidence; is a point not settled by the authorities. In the case of Williams *v.* Jones, (*d*) Sir W. Grant, M. P., after saying that the question was, whether in the circumstance that one has a legacy for his trouble, there is any thing more than a presumption against the other, (decisive, if unanswered), declared that he knew of no rule of law, that if one executor is a trustee, the other could not, even with the intention in his favour, have the beneficial interest attaching upon the executor; and parol evidence was admitted to repel the presumption in favour of the next of kin, against the executor, to whom no legacy was given. By this case, therefore, the general position which occurs in several cases, (*e*) that if one executor be a trustee, on whatever constructive ground, his co-executors must be trustees also, received an important modification.

But in the subsequent case of Griffiths *v.* Hamilton (*f*), Lord Eldon declared his opinion that "the principle established in White *v.* Evans, (*g*) that if one of the executors is a trustee, they are all trustees, is clear. It must be so: for as they must all take jointly, they must be all trustees, or all take the residue beneficially among them."

Where the office is limited.

There are cases where the office of executor has been temporary; and so limited as to give place at a particular period, or in a certain event, to another, appointed to succeed him. Such cases have, however, been usually decided upon their own circumstances; and, therefore, do not generally afford any rules applicable with certainty to other cases. It appears, however, to be a principle of clear deduction that, though a legacy or part of the residue may be given to a temporary executor, those who are appointed to succeed to the

(*d*) 10 Ves. J. 77.

(*e*) White *v.* Evans, 4 Ves. J. 22. Milnes *v.* Slater, 8 Ves. J. 308. Sadler *v.* Turner, ib. 624.

(*f*) 12 Ves. J. 308.

(*g*) 4 Ves. J. 21.

office, if not precluded by inference of intention to the contrary, will be entitled to the undisposed of residue. (*h*)

Where a testator, by his will, appointed A. and B. executors, and by a codicil revoked the appointment of B., and named two other persons C. and D. executors in his place, with the same power, authority, and share of his estate as the said B. would have had, by virtue of the will with the other executor;" it was held that, the substituted executors, and A., the remaining executor, should each have a third of the residue. (*i*)

Executors are joint-tenants of the surplus.

If there are several executors entitled to the surplus, they take as joint-tenants; so that, if one of them dies before the division, it has been held that the survivors become entitled to the whole. (*k*) And if one of several executors interested in the surplus does not prove the will till after the death of his co-executors, he will have a right to the whole by survivorship. (*l*) Even where part has been divided, so much as remains undivided will belong to such survivor. (*m*)

Where the will commences with a declaration of intention to dispose of the whole residue, how the executor's interest is thereby affected.

Where the will has been prefaced with a declared intent to dispose of the whole personal estate, an inference in favour of the executor has been sometimes drawn from that circumstance. Thus, where a testatrix, after enumerating the particulars of her personal estate, expressed her intention to dispose of the same by her will, Lord Macclesfield observed that those expressions were material in favour of the executor. His Lordship, in that case, decreed for the executor, who had a legacy by the will; but it is to be observed that there was parol evidence to rebut the presumption arising from that circumstance. (*n*)

Other Judges have considered these initiatory declarations as of small weight, where the executor has a legacy, to repel the presumption in favour of the next of

(*h*) Mason *v.* Hawkins, 4 Bro. P.C. 7. Ed. Toml.
(*i*) Frewin *v.* Relfe, 2 Bro. C. C. 220.
(*k*) Bishop of Cloyne *v.* Young, 2 Ves. 97. per Lord Hardwicke.
(*l*) Griffiths *v.* Hamilton, 12 Ves. J. 298. (*m*) *Ibid.*
(*n*) Duke of Rutland *v.* Duch. of Rutland, 2 P. Wms. 210.

kin from that circumstance. (*o*) In the case of Clennell *v.* Lewthwaite (*p*) Sir P. Arden, M. P. took no notice of the words with which the testator began his will, "being mindful to dispose of my worldly estate, I do make this my last will in manner following." The executor had a legacy: but parol evidence was admitted to repel the presumption, and his Honour decreed in his favour. Lord Loughborough affirmed that decree upon the same ground; observing only, on the effect of the general declaration at the beginning of the will, that, "though a slight circumstance, it was not wholly to be laid out of the case that the testator had set out with a declaration of intention to dispose of all his property."

Where these general words intimating or declaring an intention to make a total disposition are introduced after the appointment of executors, the inference, as far as they afford any, would appear to be adverse to the executor's interest; for it shews that the testator meant the whole to be the subject of the subsequent disposition, and did not conceive that, by the appointment of executors, he had already disposed thereof. (*q*) But in the case from which we borrow this *dictum*, there were other circumstances in the will which induced the decree against the executors. And, in another case, where the testator directed certain charges to be paid "out of the residue of my personal estate, which I have not herein disposed of," *and* then appointed executors, Sir W. Grant would not found upon these words any inference against the executors, to whom he decreed the residue, only one of them having a legacy. (*r*).

Executors may become trustees for the heir at law.

Executors may, in some cases, be trustees of the money in their hands, undisposed of by the will, for the heir at law of the testator. As where they are

(*o*) Willis *v.* Brady, Barn. 64. Nourse *v.* Finch, 2 Ves. J. 78.
(*p*) 2 Ves. J. 465, 644, 650.
(*q*) See Girand *v.* Hanbury, per Sir W. Grant, 3 Meriv. 150.
(*r*) Pratt *v.* Sladden, 14 Ves. J. 193.

directed to sell the real estate for particular purposes, and in the event there remains in their hands a surplus of the produce of the sale not required for the special objects of the trust, the money will belong to the heir as actually a part of the real estate not disposed of. (*s*)

Legatees made trustees.

Slight intimations also of a testator's intention will make legatees trustees for others; and words of request, recommendation, or desire, will have that effect. (*t*) Wherever the object for which a legacy is given is in any way distinctly marked, the legatee is held a trustee for effectuating the testator's intention. (*u*) And even if a bequest charged with an annuity lapse, by the death of the legatee; yet the executor or residuary legatee, or whoever takes the benefit of the lapse, will be held a trustee for the annuitant. (*x*)

Admissibility of parol evidence.

Where the executor has a legacy we have seen that, by such gift, a strong presumption is raised against him, and in favour of the next of kin, as to the interest in the undisposed of residue: it is now to be considered how far this presumption may be rebutted by evidence of matters, *dehors* the will, shewing a contrary intention in the testator. In the earlier cases there was a very general repugnance to admit parol evidence, in opposition to this equity for the next of kin. It was a *vexata quæstio*, on which there was a great variety of opinion. It seems, indeed, that the hesitation so frequently expressed in the old cases to receive this extrinsic evidence arose, in a great degree, from the doctrine that in courts of equity an executor was not to be considered as any thing more

(*s*) Hutcheson *v.* Hammond, 3 Bro. C. C. 148. Cruse *v.* Barley, 3 P. Wms. 22, and note (1). Currie *v.* Pye, 17 Ves. J. 463. Dennison *v.* King, 1 Ves. and B. 279.

(*t*) Lewis *v.* King, 2 Bro. C. C. 603. Malcott *v.* Brucey, 1 Ves. 208. Morice *v.* Bishop of Durham, 10 Ves. J. 536.

(*u*) Wilts *v.* Boddington, 3 Bro. C. C. 95. Moggridge *v.* Thackwell, 1 Ves. 475. Collier *v.* Collier, 3 Ves. J. 33.

(*x*) Oke *v.* Heath, 1 Ves. 142. Paice *v.* Archbishop of Canterbury, 14 Ves. J. 370. James *v.* Allen, 3 Meriv. 17.

than a trustee. (x) But since the case of Foster *v.* Munt, (y) an executor has been uniformly regarded as entitled to the whole undisposed of residue, unless there is a strong presumption to the contrary, which a legacy given to the executor was, in that case, considered as affording.

Mr. J. Buller, sitting for the chancellor, in Nourse *v.* Finch, (z) disclosed an opinion very adverse to the admission of parol evidence *at all,* in such cases; avowing the short period of his authority in that Court as his reason for declining an opposition to the numerous determinations which favoured the contrary doctrine. It appeared also to be the clear opinion of that Judge, that at most, only that evidence could be admitted, even as the authorities then stood, which applied to the time of the making of the will; and he probably would have rejected the evidence offered on that ground, if, under his third view of the case, it had not been clear against the executrix.

But since the case of Clennell *v.* Lewthwaite, (a) in which the reasoning of the Court, in Nourse *v.* Finch, was much under review, and ably observed upon: it seems to have been regarded as settled, that parol evidence, of all kinds, is admissible, to rebut the resulting equity for the next of kin, arising from any matters in a will presumptively excluding the executor from the benefit of his legal title to the undisposed of residue. And it appears to be of no importance, as to the mere question of admissibility, whether the matters in proof were contemporary with, or subsequent to, the will; although there is a great difference in the weight of the testimony, as it refers to a contemporary or subsequent period.

(x) See the case of Duke of Rutland *v.* Duchess of Rutland, 2 P. Wms. 212.; and the observations of Powis J. in Rachfield *v.* Careless, 1 P. Wms. 548. That an executor or administrator, having paid all debts, legacies, and funeral expenses, was compellable to divide among the next of kin, seems to have been a proposition inadvertently laid down in 2 Inst. 33.

(y) 1 Vern. 473. 2 Vern. 676.

(z) 1 Ves. J. 344. (a) 4 Ves. J. 471.

All the cases were then set forth in the order of time in which they were decided; and profoundly commented upon by the late Lord Alvanley, who yielded to the pressure of authorities for admitting the extrinsic evidence in these cases, except where the expressions of the will carried so prevailing an import against the executor, as to amount to a *declaration* of trust for the next of kin; which, according to the effect given to it in Rachfield *v.* Careless, (1) will shut out all

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(1) It is to be observed that in the case of Rachfield *v.* Careless, as the same is reported in 2 P. Wms. 158, evidence seems to have been admitted in favour of the next of kin; upon which Mr. Coxe remarks, that it appears to be the only case in which parol evidence has been admitted in favour of the next of kin. Nothing, indeed, is more obvious than the distinction between *raising* and *rebutting* a presumption or an equity; for the former of which objects parol and extrinsic evidence can never, without great violation of principle, be admitted. But the equity ought first to be raised by the presumptive construction of the instrument, to which equity parol evidence may be opposed; and then it follows, upon sound maxims both of law and equity, that parol evidence may likewise be adduced in opposition to this rebutting evidence, and in support of the original presumptive equity. And this, it is apprehended, has been the most approved rule of proceeding; so that the observation of the learned editor just alluded to must be understood as adverting only to the inadmissibility of parol evidence in the first instance, and for the purpose of *raising* the equity for the nearest of kin against the legal title. Indeed, the parol evidence, in the case last mentioned, for the next of kin, seems to have been superfluous; since the presumption against the executor, from the particular language of the bequest to him, was so strong as to amount to a declaration by the will itself. The case of Langham *v.* Sandford, 17 Ves. J. 435, agrees with all that has before been said in this note; and though in that case the particular legacy given to the executor was accompanied by an exception of part of the property which was the subject of it, and which part, not being otherwise disposed of, would have fallen into the residue, and so have defeated the testator's purpose, considering the legacy not as an exclusion; yet such exception was not held to afford any inference in prejudice of the executor. The case was, however, decided against the executor, on account of the weakness of the evidence which was adduced on his side. Upon the whole, it may be stated, that the leaning of Courts of equity is

Of the distinction between admitting evidence to *raise*, and to *rebut* an equity.

access to argument from external circumstances. Finally, in Trimmer *v.* Bayne, (*c*) the doctrine received its full confirmation from the present Chancellor, who declared the sum and sense of all the authorities to be, that all parol *declarations*, whether made *before*, or *at*, or *after*, the making of the will, were admissible to *rebut presumptions*, though they are not all alike weighty and efficacious. Although they may consist of conversations with people who have nothing to do with the question, or of declarations provoked by impertinent enquiries, in whatever form they arise, they are *all* evidence, though entitled to very different credit and weight, according to times and circumstances; as will be further explained in the succeeding Section.

SECT. VII.

Testator's Declarations, how far evidence.

Contemporary declarations are most to be attended to.

IN the case of Druce *v.* Dennison, (*d*) Lord Eldon observed, that formerly the courts were very jealous of admitting evidence of declarations by the testator, except such as were made by him about the time of making the will; and towards the conclusion of his judgment in that case he remarked that, in receiving parol evidence, it gave him great satisfaction to find that

(*c*) 7 Ves. J. 518. (*d*) 6 Ves. J. 385.

strongly against the executor's being excluded by having a particular legacy bequeathed to him; and in the case of King *v.* Dennison, 1 Ves. and Beames 278. it was observed, by the present Chancellor, that the doctrine had given so little satisfaction that case upon case had occurred paring down its application, until it was not easy to say upon what foundation it stood.

it was contemporary with the will. So in Nourse *v.* Finch, (*e*) Buller J. expressed a strong opinion against admitting declarations which did not take place at the time of making the will. And the further we go back, in tracing this disposition to reject parol evidence of declarations made before or after the will, the more strongly we find it expressed. Thus, Lord Hardwicke observed (*f*) that the time of making the declarations was very material, and no regard ought to be paid to declarations not made at the time of making the will. Thus, also, in the case of the Duke of Rutland *v.* the Duchess of Rutland, (*g*) it was said by Lord Macclesfield, that allowing parol evidence was exceedingly dangerous, and not to be done in the case of declarations made at a different time from that of making the will. And, again, by Tracy, J. (*h*) it was said, that no regard ought to be paid to expressions before or after the making of the will, which possibly might be used by the testator, on purpose to disguise what he was doing, or to keep the family quiet, or for other secret motives or inducements.

The positions of the present Chancellor in Trimmer *v.* Bayne (*i*) are to be read with discrimination: what he there observes as to the general admissibility of parol declarations is applicable, and was applied only, to the question, whether an executor being also a legatee in a will is a trustee for the next of kin, or beneficially entitled to the residue undisposed of; which is a question of rebutting an equitable presumption, as has been explained in another place. His Lordship then lays down the affirmative with respect to the general admissibility of parol declarations to repel this presumption of equity in favour of the next of kin, with the following important distinctions, *viz.* that in the degrees of

(*e*) 1 Ves. J. 359. (*f*) 1 Ves. 324.
(*g*) 2 P. Wms. 215. (*h*) 2 Vern. 625.
(*i*) 7 Ves. J. 517. and see Lynn *v.* Beaver, per Lord Eldon, 1 Turn. 68.

Declarations made after, are more to be regarded than such as were made before the will.

such evidence, contemporary declarations are clearly of the greatest weight. Next to such contemporary declarations, those which are made *after* the making of the will are the most efficacious; for a declaration *after* the will as to what the testator had done is entitled to more credit than one *before* the will as to what he *intended* to do, for that intention may very well be altered: but he *knows* what he *has* done, and is much more likely to speak correctly as to that, than as to what he *proposes* to do.

But with different degrees of weight all these declarations are admissible.

But with these, and perhaps other distinctions, such parol declarations by a testator are all alike admissible —they are to be decided upon by their *weight*—but by their *nature* they are all admissible. (*k*) The caution, however, with which all declarations by a testator should be admitted, is well pointed out in the same judgment, in Trimmer *v.* Bayne, *viz.* that these declarations may be made with a view to delude, as being thought a necessary artifice to keep the peace of families: and in the same case, it was one of the grounds of the judgment, that the declarations there stated to have been made, and offered as evidence, had an evident purpose of deceiving the person making the inquiry.

(*k*) Vide Trimmer *v.* Bayne, 7 Ves. J. 519.

END OF VOL. I.

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